

J. Howie

DE

JURE MARITIMO

ET

NAVALI:

OR A

TREATISE

OF

AFFAIRS MARITIME,

AND OF

COMMERCE.

In TWO VOLUMES.

o VOL. I.

The TENTH EDITION, with many valuable Additions,
brought down to the present Time.

By CHARLES MOLLOY, late Barrister at Law.

L O N D O N :

Printed for T. WHIELDON and T. WALLER, opposite
Fetter-Lane, Fleet-Street.

MDCCLXXVIII.

Rec. Dec. 7, 1904.

TO THE
R E A D E R.

THE Wisdom of God is highly to be admired, who hath not endow'd the other living Creatures with that Sovereign Perfection of *Wisdom*, but hath secured and provided for them by natural Muniments from Assault and Peril, and other Necessities: But Man he formed naked and frail, because of furnishing him with Wisdom, Understanding, Memory, and Sense, to govern his Actions; endowing him with that pious Affection of desiring Society, whereby one is inclined to defend, love, cherish, and afford mutual Aid to each other: Nor hath he in no less wonderful manner (infinitely transcending all human Wisdom and Understanding) created the material World to be subservient to his Being and Well-being: Yet without human Understanding and Reason did he not build a Ship, raise a Fort, make Bread or Cloth; but these came to pass only by human Arts and Industry,

Seneca 4. de
Beneficiis, cap.
18.

try, in which by the Revolutions of the Celestial Bodies, Times and Seasons, Materials and other Necessaries are brought forth, by the Alteration of which, Men in their proper Seasons reap the Fruits of their Labour; so that there is no Society, Nation, Country, or Kingdom, but stands in need of another. Hence it is, that Men knowing each others Necessaries, are invited to *Traffick* and *Commerce* in the different Parts and Immensities of this vast World to supply each others Necessities, and adorn the Conveniencies of human Life.

Leg. ut vim.
D. de just. &
ur. n. 7, & 8.

And as God hath so ordered this wonderful Dependance of his Creatures on each other, so hath he by a Law immutable provided a Rule for Men in all their Actions, obliging each other to the Performance of that which is right, not only to Justice, but likewise to all other moral Virtues; the which is no more *but the Dictate of right Reason founded in the Soul of Man, shewing the Necessity to be in some Act by its Convenience and Disconvenience in the rational Nature in Man, and consequently that it is either forbidden or commanded by the Author of Nature, who is the eternal Creator of all Things.* And as God hath imprinted this universal Law in the Minds of all Men, so hath he given Men Power (Society being admitted) to establish other

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other Laws, which proceed from the Will, the which is drawn from the Civil Power, that is, from him or them that rule the Commonwealth, or Society of Freemen united for their common Benefit, (which is called the *Laws of Nations*) and which by the Will of all or many Nations, hath received Force to oblige; and is proved by a continued Use and Testimony of authentick Memorials of learned or skilful Men.

Vasquez 2.
Controv. 54.
4.

Now by the Laws of Nature every Man is bound to profit another in what he can, nor is the same only lawful but commendable; so true was that saying, *Nothing is more serviceable to Man than Man*. But if Man shall neglect this immutable Law in the aiding and assisting his Fellow Citizen, and inquire and dispute why God hath laid this Necessity upon him; and when Opportunity gives leave to take the Benefit of Wind or Tide (in order to his furnishing himself or Neighbour with those things that adorn human Life) to dispute the Causes of their Flux and Reflex, and how they vary and change; he not only offends the Laws of Nature, but assumes a Power of destroying Society, and consequently becomes (at the least) wilful Transgressor of the Laws of Nature. And though the Eternal Power hath so established this Necessity in Mankind,

Florentius 3.
part. tit. 22.
Sect. 5.
Leg. Servius
D. de serv.
ex part.
Cicero Offic.
lib. 11. de
Panetio.

AND
N
H
M

that every Man shall stand in need of another Man, yet so great a Providence is over industrious Men, that scarce any Man not disabled by Nature or Accident, Sickneſs, Impotency, and the like, but by his Industry and Pains may earn more than would ſupply his Neceſſities; and ſo much as any Man gets by being truly industrious above what ſupplies his Neceſſities, is ſo much beneficial to himſelf and Family, as alſo an enriching to that Kingdom or State where he reſides; From whence it is, that all Mankind (preſent or to come) are either Traders by themſelves or others; and the Ends deſigned by Trade and Commerce, are Strength, Wealth and Imployment for all ſorts of People, (where the ſame doth moſt flouriſh) the End tending to the Advancement, Opulency and Greatneſs of ſuch a Kingdom or State.

*Coke. 2. Inſt.
foli 28.*

Anno 1453.
*Vide Knowledge
History of the
Monarchy.*

Conſtantinople (the Throne once of Chriſtendom) having been ſacked by *Mahomet* the Second, became a Place of Deſolation as well as Horrour, yet he by granting a free Trade and Religion, ſoon after re-peopled that great (but unhappy) Spot. Nor did *Silemus* tread a miſs in following the Steps of his victorious Predeceſſor, when having thoſe like ſieges on *Tauris* and *Grand Cairo*, he treated the *Persian* and *Egyptian* Artificers and Traders to that re-peopled City,

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City, following the Example of the *Roman* Virtues. Nor did our victorious *Third Edward* deem it an Act unbecoming his great Wisdom, when he brought in the *Walloons*, whose Industry soon established the Woollen Manufacture, he vouchsafing to give no less a Security for the enjoying their then granted Immunities and Privileges, than his own Royal Person. Nor did that politick Princess shut her Ears from embracing the Offer of those distressed *Burgundians* (after the Example of her Great and Royal Predecessor) who sought Refuge in her Dominions from the rigid Severity of the long-bearded *Alva*, who planting themselves by her Appointment at *Norwich, Calchester, Canterbury*, and other Towns, have of those Places (then only Habitations for Beggars) raised them now in Competition with (if not excelling) all, or most of the Cities in *England*, for Riches, Plenty, and Trade. Nor need we run into the History of earlier Times to give an Account of the many Kingdoms and States that have risen by Industry and Commerce; 'tis enough if we cast our Eyes on our Neighbour the *Hollander*, a Place by relation of *Ortelius*, not much bigger than *Yorkshire*, and such a Spot as if God had reserved it as a Place only to dig Turf out of, for the accommodating

those

Mirror, c. 5.
Señ. 2.
11 Ed. 3. c. 3.

Vide Camden's Q. Elizabeth, An. 1568.
A. E. Meteran. Pistor. Belg. lib. 3.

those Countries wherein he hoards up the Miseries of Winter, it affording naturally not any one Commodity of use; yet by Commerce and Trade (the Daughters of Industry) it is now become the Store-house of all those Merchandizes that may be collected from the rising to the setting of the Sun, and gives those People a Name as large and high as the greatest Monarch this Day on Earth: Nor need we pass out of Christendom to find Examples of the like, when *Venice*, *Genoua*, *Lubeck*, *Embsen*, and the rest of the *Hanfiatick* Towns, once the Marts of the World, till Sloth, Luxury, and Ambition, got within their Walls, and drove it to Ports of Industry that have since kissed and embraced it, the which this Isle, by the Influence of his Royal Majesty, hath been no small Sharer in.

Hence it is, that Trade and Commerce are now become the only Object and Care of all Princes and Potentates, its Dominion not being acquired by the ruful Face of War, whose Footsteps leave behind them the deep Impression of Misery, Devastation and Poverty, they knowing the Return of Commerce is Riches and Plenty of all things conducing to the Benefit of human Life, and fortifying their Countries with Reputation and Strength.

It

It was Trade that gave occasion to the Anno 1666.
 bringing of those Mighty Fleets to Sea, 1672, 1673.
 as if God had left it to them to decide
 by Force, (wherein no Age or Time can
 witness the like) the Empire of the
 World: Hence it was, (the Advantages
 being found which arise by Commerce)
 that *Navigation* got its Birth into the
 World, reducing the several Nations on
 the Earth by that means to be even as
 one common Family; and when in this
 Isle we were even in the State of Cani-
 bals, it brought in a People that instruc-
 ted us in Arts, Policies and Manners, *Camden.*
 and taught us Actions no less virtuous
 than those themselves followed; And
 altho' long and difficult it was before
 that mighty People could be brought
 over to have Thoughts of the Advanta-
 ges arising from *Commerce* and *Naviga-*
tion (they only propounding to them- Quæstus omnis
indecorus pa-
tribus, says
Livy, lib. 1.
Dec. 3.
 selves Blood, Slaughter, Conquest, the
 Riches and Spoils of Nations;) yet
 when they entered into the *Carthaginian* Though they
had 100 Ships
and 75 Gal-
lies under
Caius Duillus
and his Col-
league, as Po-
lybius ob-
serves.
 War, a Quarrel with a People not
 worth the Opposition of a Tribune (as
 they thought) finding that neither *Tri-*
bune nor *Consul*, no nor the Flower of
 the *Roman* Army was able to withstand
 them, or to prevent the Invasion of their
 Country, and they in the very Bowels
 of the same, put it to the Question,
Rome or *Carthage* Mistress of the
 World;

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World; they began to consider whence and from what Causes those unknown *Africans* should withstand the *Conscript Fathers* and Power of *Rome*, and should dare to dispute with those that had led so many captivated Kings in Triumph, and brought so many haughty Nations to truckle under their victorious Eagles; at last they found it was *Commerce* and *Navigation* that gave Power and Force to that mighty People; then it was that *Rome* began to know *that Rome could not be Rome without a naval Force*; the which, and to redeem their bleeding Honour, they soon hastened and equipt, great as their Competitors; afterwards *Argentum* being won, *Carthage* became no more impregnable; after which with Peace they plowed the neighbouring Streights to *Tinges*, * *Gades*, and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arrived on the *British* Shore, where beholding her ample Bays, Harbours, Rivers, Shores, and Stations, the Jewels and Ornaments of that Spot, and having made a Conquest of the same) they soon cultivated into our rude Natures the Spirit of *Commerce*, teaching and instructing us in those polite Ways that fortify a Kingdom by Naval Force, as the *Standard* and *undeniable Marks* of *Empire*, and by aiding and teaching us in

• Now the important City of *Tangier*.

in the driving on a continued and peaceable Tract of Commerce, we have fathomed the unknown Depth of the *Indian* Shores, uniting, as it were, Extremes, made the Poles to kiss each other, teaching us thereby, that it was not the vast immensities of Earth that created Empire, but Situation accompanied with *Industry, Commerce, and Navigation*, that would enable a People to give Laws to the World: In the Pursuit of whose Virtues, this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleet; for they, when they advanced their *Eagles* on the *British* Shore, found us not then without Ships of Force, Time having not been so envious to this Island, as to eat out those Records wherein mention is made, that the *Britains* accompanied the *Cymbrians* *Strabo, lib. 3.* and *Gauls* in their memorable Expedition to *Greece*, long before the Incarnation of the World's Saviour; and it was from that Center that the mighty *Cæsar* first drew his Line, and took Thoughts of plowing the Ocean to find out that warlike People to face his victorious Legions; when having landed, and finding a Place adorned by Nature beyond any thing that could be called great, taught us to maintain the Superiority of Dominion, that no neighbouring

*Gauls Towns
near Yarmouth
the Mart for
those neigh-
bouring Mer-
chants.*

*Abrahamus
Whelochus de
priscis Anglo-
rum legibus,
written origi-
nally by Mr.
Lambard.*

ing Nation should frequent our peacea-
ble Shores, and those Merchants that
came were assigned Places to drive their
Commerce and Traffick, jealous that
any neighbouring Rival should kiss his
beloved *Britannia* but a *Roman*, and for
whom he fetched so long and tedious a
March; thus in our Infancy, teaching
us both Defence and Commerce. And
when that mighty Empire began to de-
cline, and those remaining *Romans*, be-
gan to moult and mix among the Na-
tives, and to become as one People a-
gain, then Sloth, Luxury, and Idle-
ness (the Forerunners of Ruin) invaded
our Shores by a fatal Stupidity, which
suffered our floating Castles (Bulwarks
of the Kingdom) to rot in their neglec-
ted Brine, and our Ports to be surveyed
by Foreign People; which supine Neg-
ligence soon subjected us a Prey to our
ambitious Neighbours, who no sooner
finished their Conquests, and sheathed
their devouring Swords, but each (as
if inspired by the very Genius of the
Place) equip'd out Fleets great as their
Competitors, to secure what they had
so dearly won, of whom Story makes
mention of the mighty *Arthur*, no less
famous in his warlike Atchievements,
than in leading his Squadrons as far as
Iceland, bringing those Northern Peo-
ple to pay Obeisance to his victorious
Stand-

Standard, and acknowledge him as their supreme Lord, even from the *British* to the *Russian* Tracts, and by him left to famous *Edgar*, who no sooner found his undoubted Right, but resolved to vindicate that Dominion which his Royal Predecessor had with so much Glory acquired, and with so great Care communicated and remitted down to his Successor: With no less a Number than four hundred Sail of Ships did that mighty Prince at once cover the neighbouring Ocean, making them the *Portcullis* of this Isle and the adjacent Seas, by which he vindicated his Dominions on the Waters, and gave Laws in the Chambers of his Empire: Nor did his Successors *Canutus* (whom Record makes mention, that having laid that ancient Tribute, called *Danegeld*, for the guarding of the Seas, and Sovereignty of them, was emblematically expressed, sitting on the Shore in his Royal Chair, while the Sea was flowing, speaking, “*Tu meæ ditionis es, & terra in qua sedeo est, &c.*” *Egbert, Altbred, Ethelfred*, forget the Assertion of their great Predecessors Dominion and Sovereignty of the same, under no lower a Style, than “*Supreme Lords and Governors of the Ocean surrounding the British Shore,*” never so much as contested by any Nation whatsoever, unless by those that attempted

Inserted in
Leges Edwardi, and afterwards confirmed by the
Norman Conqueror.
Mr. Selden's Mare Clausum, lib. 2.
cap. 10, to 16.

Matth. West. Anno 1035. fol. 409.
Selden's Mare Clausum, lib. 2. cap. 11.

Coke 4. Inst.
fol. 142.

Inter Leges
Marinas sub
fine anni Regni
Regis Johan.
2.

attempted the Conquest of the entire Empire, in which that became subject to Fate as well as the other of the Land: Nor did the succeeding Princes also of the *Norman* Race start or wave that mighty Advantage in their successive Claims, and maintaining their Right to the adjacent Sea; as appeared not long after, by that famous Accord, made between *Edward the First*, and the *French King Philip the Fair*, calling him to an Account for Piracies committed within the *British Seas*; the Submission of the *Flemings* in open Parliament in the Second *Edward's* Reign; and the Honour or *Duty of the Flag*, which the politick King *John* had above four hundred Years since challenged by that memorable Ordinance at *Hastings*, there decreed to take Place universally, not barely as a *Civility*, but as a *Right*, to be paid *cum debita reverentia*, and Persons refusing to be assaulted and taken as Enemies, the same not only to be paid to whole Fleets bearing the Royal Standard, but to those Ships of Privilege that wear the Prince's Ensigns or Colours of Service: Nor was this barely a Decree written, but nobly asserted by a *Fleet* of no less than 500 Sail in a Voyage Royal of his, wherein he sailed for *Ireland*, in his way commanding all Vessels which he met in the eight circumfluent

cumfluent Seas to pay that Duty and Acknowledgment. Nor was the Third Edward slow in following the Steps of his wife Predecessors, when he equip'd out a *Fleet* of no less than 700 (though on another Occasion) with 200 of which he vanquished a *Fleet* of twice the Number before *Calais*, to the Loss of 30,000 *French*. Nor did our victorious Conqueror of the Sepulchre, the Great *Richard*, in his Return from the *Holy Land*, want a Naval Royal to attend him home, by the Force of which he took and destroyed near 100 more Ships of the *French*. And look we but into the mighty Actions of the succeeding Princes, we shall find that all that ever designed Empire were zealous in the Encouragement of Navigation, looking on that Axiom as undeniable, *Qui Mare tenet, Cic. ad Attic. eum necesse esse rerum potiri*, and that l. 10. Ep. 7. without which the *British* Sovereignty is but an empty Title.

Nor ought alone the Praises of those great Monarchs, whose mighty Care had always been to preserve the Reputation of their Empire in their Maritime Preparations, to be remembered, but also those of our Inhabitants, who always have been as industrious to follow the Encouragement of those Princes under whom they flourished, and who with no less Glory and timely Application

Born in Eng-
land, but Re-
sident at
Genoa.

Hen. 7.

Campanel.
Hist. Hispan.

tion in Traffick, did constantly follow the Examples of those of *Genoa*, *Portugal*, *Spaniards*, *Castilians*, and *Venezians*, whose Fame in Matters of Commerce ought to be enrolled in Letters of Gold, since the Ages to come, as well as present, having been doubly obliged to their Memory, the third of which making use of a discontented Native of this Isle, the famous *Columbus*, who, prompted by that Genius that naturally follows a native wise Man, discovered a new World, in whose Expedition he fathomed unknown Paths, and detected the *Antilles*, *Cuba*, and *Jamaica*, &c. and the *Terra Firma* of the *American* Shore, who taking his Conjectures from the spiring of certain Winds from the *Western* Points by strong Impulse, accompanied with that Philosophy he attained to, concluded some Continent must needs be hid in those unknown Parts; his Service being first offered to his Prince, and refused, he was soon after entertained, purely on the Faith of that noble Princess *Isabella* of *Spain*, who for 17,000 Crowns (for which she engaged her Jewels) received not long after, as many Tuns of Treasure, and to her Husband's own use, in eight or nine Years Time came above fifteen hundred thousand of Silver, and three hundred and sixty Tuns of Gold.

Thus

Thus Ingenuity encouraged, though in one single Person, hath occasioned Wonders, and from a small Kingdom (as *Spain*) it hath since raised its Head, in a Condition of bringing all those many Kingdoms, and vast Immenfities of Earth which they possess, under their Protection; putting them once on Thoughts of no less than an UNIVERSAL MONARCHY. We need only mention *Sebastion Chabot*, a Native of *Bristol*, who discovered *Florida*, and the Shores of *Virginia*, dedicated to that Virgin Princess *Elizabeth*, *Tborn*, *Elliott*, *Owen*, *Gwyned*, *Hawkins*, *Cavendish*, *Furbisher*, *Davis*, *Stadson*, *Raleigh*, and the incomparable *Drake*, who was the first (agreed universally) of any Mortal to whom God vouchsafed the stupendous Atchievements of incompassing not this New World alone, but New and Old together, twice embraced by that mighty Man, who first making up to *Nombre de Dios*, got Sight (with Tears of Joy) of the *Southern Seas*, the which in five Years after he accomplished, passing through the *Magellan Streights* towards the other *Indies*, and doubling the famous Promontory, he circumnavigated the whole Earth.

Nor ought that truly worthy Captain Sir *John Narborough* be precluded from having Place after the mighty *Drake*,

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He having not long since passed and re-passed the *Magellan Streights*, by which that worthy Person hath performed that Atchievment, which was never done by any Mortal before. To reckon up the particular Actions of *John Oxenham* (a Sharer in that mighty Performance of *Drake*) who drawing his Vessel up to Land, and covering the same with Boughs, passed the unknown Paths of Land from *Nombre de Dios* to the South Sea, and there building a Pinance, enters the Isle of *Pearls*, and from the *Spaniards* takes a Treasure almost beyond Credit; of the undefatigable Diligence of *Willoughby*, *Burroughs*, *Chanceler*, *Buffin*, *Furbisher*, *James Middleton*, *Gilbert Cumberland*, who plowed up the North-East and North-west *Catharian* and *China* Passage; of *Jones* and *Smith*, whose Fortune and Courage was great in those Parts; of *Poole*, who found the Whale Fishing; of Captain *Bennet*, the first Discoverer of *Cherryland*; of *Gillian* and of *Pett*, and *Jackman* that passed the *Vaigates*, *Scythian* Ices, and the River of *Ob*, as far as *Nova Zembla*; nor of the famous *Davies* and *Wood*, who had penetrated to 86 Degrees of Latitude, and almost set their Feet on the Northern Pole, and for truly valiant the famous *Monk*, *Blake*, *Lawson*, *Mines*, *Sandwich*, *Ossory*, and the

the never-to-be-forgotten *Spragg*, and living his Royal Highness *Dork's* victorious Duke, and the brave *Rupert*, Men whose Courage and glorious Actions as well in Battles as in the attchieving of Discoveries, and pointing out to Places for an immense Improvement in Navigation and Commerce, ought to be insoll'd in the Temple of Fame as Monuments to succeeding Ages, of their mighty and laborious Travails and Industry. The Consideration of all which gives some Sparks of Encouragement to the writing the ensuing Tract, especially when reflecting, that among all Nations, there is a Common Law which governs the mighty Thing of Navigation and Commerce; I had some Impulses more than ordinary to induce me to the same, especially at a time when Navigation and Commerce were never (from the Erection by Divine Instinct of that mighty Prototype, the Ark to this present Age) in greater Esteem than now, and by which we have found vast and great Easements and Discharges from those royal and just Rights and Dues, which now and of old were justly due to those that governed this Empire; therefore ought by all Ways and Means to be fortified and encouraged, be it by whatsoever Art, Science or Thing, that does in the least point out towards

the same. Nor was it then wanting in Thoughts to promote and incite the Professors of the Law, raising and stirring up their Genius to the Advancement of the Law in this Point; and though I believe many have wished that such a thing might be, yet none that I can find have ever yet attempted the same: Nor is it possible, unless those things which are by Law *constituted and known*, be rightly separated from those that are *natural*; for natural Law is immutably and always the same, therefore may easily be collected into Art: But things that come from Constitution, because they often vary and change, and are divers in divers Places, are put without Art; as other Precepts of Laws positive or municipal; hence it was that the Constitutions and Laws of *Rhodes*, for their Justice and Equity, got footing amongst the *Romans*, as well as amongst other the bordering People on the *Mediterranean*, *Rhodiorum usq; rerum memoriam disciplinae Navalis & gloria remansit*; yet when they, as well as the *Romans*, became subject to Fate, they then remained only as Examples of Justice and Reason for others to imitate and follow: An obsequious Adorer of which was the great *Justinian*, who caused them to be inserted into the Civil Law; and though they obtained a Place

*Manil. pro
Orat. Leg.*

And M. Ser-
jeant *Callis*
must be so un-
derstood of the
ancient Civil
and Modern

Place amongst others of the Ancient *Romans* as well as the Modern, yet have they not all received by Custom such a Force as may make them Laws, but remain only as they have the Authority in Shew of Reason, which binds not always alike, but varies according to Circumstances of Time, Place, State, Age, and what other Conveniences or Inconveniences meet with it; nor have those Laws, instituted at *Oleron*, obtained any other or greater Force than those of *Rhodes* or Imperial, considered only from the Reason the which are not become Laws by any particular Custom or Constitution, but only esteemed and valued by the Reasons found in them, and applied to the Case emergent.

'Tis true, that in *Rome*, and some other Parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all those Cases wherein the municipal Ordinances of those Countries have failed in providing, the Imperial Laws (if the Case be such as that it *non Tragua peccado*, or be not spiritual) is there made of Force; but there is no other Nation, State or Republic can be named, where any Part of the Body of those Imperial Laws hath obtained the just Force of a Law; otherwise than as Custom hath particularly induced it; and where no such

Roman Law reduced into one, and they are not now two Laws, one Civil, and the other Imperial, but only one, that is, the Imperial. Vide his reading on the Statute of Sewers, Sect. 1. fol. 31. The Article of Enquiry annexed to them in 12 Ed. 3. The Inquisition at Quinsborough, 49 E. 3. Anno 1375. Statutes of Enquiry translated by Roughton.

settled Custom hath made it a Law, there it hath Force only according to the Strength of Reason and Circumstances joined with it, or as it shews the Opinion and Judgment of those that made it, but not at all as if it had any commanding Power of Obedience, that is, *valet pro ratione, non pro inducto jure; pro ratione quantum Reges, Dynastæ, & Reipublicæ intra potestatis suæ fines valere parvuntur*: And for Spain it is observed, *Hispani duplex habent Jus, solum Cononicum scilicet & Regium; Civile enim* (meaning the Imperial Laws) *non habet vim Legis, sed rationis*. And since this Kingdom, as well as most others, being free from all Subjection to the Empire, having a constituted or known Law of its own, excludes all Imperial Power and Laws, otherwise than as Custom hath variously made some Admission, I applied myself to the Collection of such Matters, according to my Inconsiderable Judgment, as are either constituted by the Supreme Authority of the Three Estates, or that which hath in some measure obtained by continued Custom the Force of Law in reference to Matters Maritime, and of Commerce, as well in Cases publick as private.

By the first Part of which I thought it necessary, since Nature by Traffick hath

hath made us all Kinsmen, to consider and examine upon what Grounds, and in what manner, *Commerce* was first procured and established, which is by the Laws of Leagues, Embassies, and the like, which is a thing fit to be known; so likewise of what may interrupt the same, and likewise of those that have any reference to Seafaring Causes in Matters Civil.

In the Prosecution of this Work, I have taken care to refer those things, which pertain to the *Laws of Nature*, unto Notions so certain, that no Man, without offering of Violence to himself, may deny them; and to ascertain the Truth of such, I have used the Testimonies of such Authority, as in my weak Judgment are of Credit to evince the same; and as to that Law, which we call the Law of Will, or Common Consent, or the Law of Nations, for that which cannot by sure Consequence be deduced out of sure Principles, and yet appears every where observed, must needs have its Rise from free Will and Consent, which is that which is called the *Law of Nations*; both which (as much as possible) hath been endeavoured to be kept asunder where the Matter hath required it. And for the Civil Law, I have ascertained the several Authorities

thorities which I have made use of, that is of the *Romans* into three sorts, the *Pandects*, the *Codes* of *Theodosius* and *Justinian*, the *Novel Constitutions*, and these most excellent *Jurifconsults*, that have by their Profoundness of Judgment illustrated the obscure Paths of the same Law; the third those most excellent Persons who joined Policy to Law, as *Grotius*, *Ralegh*, *Bacon*, *Selden*, and the like. Of other Pieces, that of *Sbardius*, intituled, *Leges Navales Rhodiorum*, & *selectæ Rhodiorum*, *Petrus Pekius* the *Zealander*, *Locinius*, *Vinius*, that of *Oleron* collected by *Garasias*, alias *Ferrand* and *Cleriack*.

As to those Matters that have passed the Pikes at the *Rommon Law*, I have as carefully as possible referred to their several Authorities. In the whole Work I have no where medled with the *Admiralty* or its Jurisdiction (unless by the by, as incidently falling in with other Matters) knowing well, that it would have been impertinent and saucy in me to enter into the Debate of *Im-*

It is called *Imperium*, because it proceeds from the Authority of the Judge, and not from any right inherent

perium merum, *Imperium mixtum*, *Jurisdiction simplex*, and the like, and of the bounding out of Jurisdictions, which in effect tends to question the Government, and trip up the Power that gives Laws and Protection to us; since all that

that can be said, as well on the one side as the other, hath been so fully and learnedly handled and treated of by several worthy Persons (that have indeed said all that can be said) but more especially in that famous Dispute, not long since before His Sacred Majesty in Council, where all the most elaborate and ingenious Reasons that could be drawn by the Skill of a learned Civilian, were there asserted in vindicating the Admiralties Jurisdiction, by the Judge of the same, Sir *Leoline Jenkins*, in Answer of whom was produced that *Great Good Man* the Lord Chief Justice *Hale*, who as well by Law positive as other his great Reasons, soon put a Period to that Question, which during his Days slept, and it may modestly be presumed will hardly (if ever) be awaked.

in the Party.
Leg. 1. §. de
Const. Prin-
cip. Coke lib.
10. fol. 73. in
le Case del
Marbalsia.

He that hath never so little to do with the Compass, though he sits still in his Place, does as much or more than all the other necessary Noise in the Ship; the Comparison is quit of Arrogance, for it holdeth in the Design, it is not meant of the Performance.

And though I well know, that those that spend their Time in brewing of Books, are by *Seneca* compared to petty Painters, that busy themselves in copy-
ing

ing out Originals; having this half
Verse of *Horace* often thrown in their
Teeth.

O imitatores servum pecus!

Yet I have this Hope left, that my
Faults and Flaws, like those found in
the Cuts of Diamonds, may at this
Time the easier escape under the Excel-
lency of their Subject, or at least under
that of your Charity.

Charles Molloy.

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CHAP.

C H A P. I.

Of Dominion or Property in general,
and of the Causes changing the same
by War.

- I. *Of Dominion in the Primitive State of Man.*
- II. *That such a Dominion universal might have continued.*
- III. *Of the Causes changing the same.*
- IV. *Of things excepted tacitly by the Law of Dominion.*
- V. *Of Property, where the same may be changed against the Owner by War.*
- VI. *Of Publick War, solemn or less solemn.*
- VII. *Solemn War, by whom to be undertaken.*
- VIII. *An equitable Interpretation of the same in Cases of Necessity.*
- IX. *Of War by the Laws of England.*
- X. *That Justice is the very Basis that must support a War.*
- XI. *Justice what, and whether War justifiable by the Laws of Nature to preserve the same.*
- XII. *Of War, and of the Ships and Goods of an Enemy, where the Property is changed by the Laws of Nature and of Nations.*
- XIII. *Where the Property of Goods taken from an Enemy is qualified by the Law Civil.*
- XIV. *Of Restitution, where the same by Law may be of Goods or Merchandise acquired in War.*
- XV. *Of Restitution ex gratia, made by the Sovereign of him whose Ships are lost, and regained afterwards in Battle by Ships of War; and of the like by Princes or Republicks in Amity.*
- XVI. *Of the assaulting an Enemy in the Ports or Havens of Nations Neuter, whether lawful by the Laws of Nations.*
- XVII. *Of Protection given to Ships of Enemies being in Port before, and found there after War denounced.*

XVIII. *Of the Goods of Friends found in the Ships of Enemies, and of those of Enemies found in the Ships of Friends, and where Property of the same is altered.*

XIX. *Whether against Nature to destroy the Goods and Ships of our Enemies.*

XX. *Of Interpellation and Denunciation, whether necessary by the Laws of Nature and Nations.*

XXI. *Of Denunciation by the Custom of the Romans and other Nations, and whether requisite at this Day.*

XXII. *War where proclaimed against any one, includes his Subjects and Adherents, but not as considered by themselves.*

XXIII. *The true Reason wherefore Indiction was introduced.*

XXIV. *Of the Goods of Friends that supply an Enemy, whether subject to be made Prize by the Laws of Nations.*

XXV. *How dealt withal after seizure, by the Practice of antient and modern Ages.*

XXVI. *Whether lawful for a Christian to assist an Infidel against a Christian by the Laws of Nations, and by our Religion.*

I. **N**O sooner had the Eternal Power created Man, but he bestowed on him a Right over the things of this inferior Nature; nor was his Goodness lessened upon the Reparation of the World after the Flood (*all things being then undivided and common to all, as if all had one Patrimony*) since every Man might then take to his use what he pleased, and make consumption of what he thought good in his own Eyes; which use of the universal Right was then instead of Property: For what any one had so taken another could not without Injury take away from him.

Justin, lib.
43.

A Theatre is common, yet the place possessed by any one, may be rightly called his own.

II. Nor was it impossible for that State to have continued, if Men through great Simplicity or mutual Charity had lived together; and

and this is instanced in those *Americans*, who through many Ages have lived in that Community and Custom, and the other of *Charity*, which the *Essenes* of old practised, and then the *Christians* who were first at *Jerusalem*, and at this Day not a few that lead an ascetick Life: The Simplicity of our first Parents was demonstrated by their Nakedness, there being in them rather an ignorance of Vice, than a knowledge of Virtue, their only Business being the Worship of God, living easily on those things, which the Earth of her own accord brought forth without labour.

Justin, lib. 2. Ut de Scythis loquitur Trogus. Primum inter Homines mali nescia & ad hoc astutia in experta simplicitas.

III. Yet in this simple and innocent way of Life, all Men persisted not, but some applied their Minds to various *Arts*; the most antient of which were *Agriculture* and *Pasture*, appearing in the first Brothers, not without some distribution of Estates, and then from the diversity of each Man's Actions arose *Emulation*, and then *Slaughter*; and at length, when the Good were infected with the Bad, a *gigantick Kind of Life*, that is, *violent*; but the World being washed by the *Flood*, instead of that fierce Life, succeeded the desire of *Pleasure*, whereunto *Wine* was subservient; and thence arose *unlawful Loves*, but by that more general Vice *Ambition*, Concord was chiefly broken, after which Men parted asunder, and severally possessed several parts of the earth; yet afterwards there remained amongst Neighbours a communion not of cattle, but of Pastures; because in the small number of Men, so great was the Latitude of Land, that without any incommodity it might suffice to the uses of many, until the number of Men, so of Cat-

Seneca Naturalium. 3. in fine.

Ne insignare quidem aut partire limite campos Fas erat.

the increasing, Lands every where began to be divided; not among Nations as before, but among Families; an instance of which we have hourly before our Eyes in those vast immensities that are daily appropriating and planting in *America*: From hence we learn what was the cause for which Men departed from the primitive communion of things, first of *moveables*, and then of *immoveables* also; to wit, because when not content to feed upon that which grew of itself, and the Earth singly brought forth, to dwell in *Caves*, to go *naked*, or *clad with rinds of Trees*, or *skins of Beasts*; they had chosen a more exquisite kind of Life; there was need of Industry, and using of Art in those matters, which they should give themselves up to; so likewise from hence we learn, that Men not con-

Bodin. lib. 3. cap. 7.

Grotius de Mari libero, cap. 15.

tent to live in that innocent state of community, how things went into Property, not only by the act of the Mind (for they could not know the thoughts of one another, what every one would have to be his own, that they might abstain from it, and many might desire the same thing) but by a certain *Covenant*; either *express* as by division, or *tacit* as by *occupation*: For so soon as Communion did not please them, and division was not made, it ought to be supposed an agreement amongst all, that every one should have pro-

* *Cic. offic. 1. Addendum illud Quintilianus; Si hæc conditio est, ut quicquid in usus hominis cessit, proprium sit habentis.*

per to himself what he seized on, * for every one might prefer himself before another, in getting those things useful for the accommodating of human Life, Nature not being repugnant to the same.

sum hominis cessit, proprium sit habentis.

profecto quicquid jure possidetur, injuria auferitur. Macrobius Saturn. l. 3. c. 12.

IV. And

CHAP. I. OF SHIPS OF WAR.

IV. And though Property may seem to have swallowed up all that right which arose from the common state of things, yet that is not so; for in *the Law of Dominion*, extreme necessities seem excepted. Hence it is that in Navigation, if at any time Victuals fail, what every one hath, ought to be brought forth for the common use: And so in a Fire, I may pull down or blow up my Neighbour's House to save mine; destroy the Suburbs, to raise Lines or Forts to preserve the City thereby; dig in any Man's Ground for Salt Petre, cut in pieces the Tackling or Nets upon which my Ship is driven, if it cannot be disintangled by other means: All which are not introduced neither by the *Civil Law*, nor the *Municipal Laws* of Countries, but are expounded by them, with their proper diversities.

Leg. 2. §. cum in eadem D. ad Leg. Rbod. Quo non fragm. §. Quod ait. D. incend. Leg. Quemadmodum. §. item. D. ad l. Aquilam. 12. Ed. 3. tit

distress. 170. 11. H. 7. 5. Reniger & Fogassa, Plowden fol. 1. 10. 10. Coke 3 Instit. fol. 83.

V. Nor is Property so far instated in Man, but the same may again be divested by such means as stand with the Law of *Nature* and *Nations*; and first by War, the Causes of which are assigned to be three, *Defence*, *Recovery*, and *Revenge*.

Bald. lib. 3. de verum diversarum, seems to have been of opinion, that by the Laws of Nations

one may take Arms to abate the growing Power of his Neighbours. *Sed ut vim pati posse ad vim inferendam Jus tribuat, ab omni æquitatis ratione abhorret*: But that a possibility of suffering Force, should give a right of offering of Force, this is far from all Equity, says the excellent *Grotius*, lib. 2. cap. 1. sect. 27. *Ralegh's History of the World*, p. 678. *Grot. de jure belli & pacis*, l. 3. c. 6. Sect. 11, 12, 13, 14.

But then such War must be just, and he that undertakes it must be a *Sovereign*: The just causes to make a War are our *Prince's* or *Country's* defence, and that of our *Allies*, the Satisfaction of our *Injuries*, or

theirs;

theirs; our just Pretensions to an Estate or Right; Divines have added another, not only the Defence of Religion, but its Advancement and Propagation, by the way of Arms, and some the extirpation and rooting up a contrary. Certainly War is too rough a Hand, too bad a Means, to plant Piety; *Sicut non Martyrem pena, sic nec fortem pug-*
Raleigh, 680. na, sed causa; As it is not the punishment that makes the Martyr, so it is not fighting that declares a valiant Man, but fighting in a just cause; in which who so shall resolvedly end his Life valiantly, in respect of the cause, that is, in the Defence of his Prince, Religion, or Country, ought to be numbered among the Martyrs of God.

VI. Publick War is either Solemn by the Laws of Nations, or else less Solemn. What we here call Solemn is commonly called Just, in the same sense as a just Testament is opposed to Codicils, not that it is not lawful for him that pleases to make Codicils, but because a Solemn Testament hath by the Civil Law some peculiar effects; and this difference is worth Observation, seeing many misunderstanding the Word just conceive all Wars to be condemned as unjust and unlawful, whereunto this appellation of Just is not agreeable.

Ita inter cives erant quædam matrimonia non justa, non justis liberis: Paul. Sent. lib. 2. tit. 19.

For the more clear understanding of

the foregoing Section, we think it may be of use to abstract Lord Chief Justice Hale's sense of this matter as follows, — Our Wars with foreign Countries have been either special or general: 1. Special, usually called *Marque* or Reprisal, and these either particular, i. e. granted to some particular Persons on particular Occasions to right themselves, vid. *Stat. 2. H. 5. 7.* Or, 2. general *Marque* or Reprisal, which though it hath the effect of a War, yet differs in these two instances; 1. regularly no Person may by aggression take the Ship or Goods of the adverse Party, without a Commission; 2. the two Nations are not therefore in a perfect State of Hostility; though

though they mutually take from each other as Enemies; and many times these general Reprisals grow into a formed War. Such was the Dutch War 1664. *Hale's Hist. Pl. Cr. 162.*

A general War is either solemnly denounced, or not solemnly denounced; the former when War is solemnly declared or proclaimed by our King against another State. Such was the Dutch War 1671, (and the late War with Spain.) An unsolemn War is when two Nations slip into a War without any solemnity; and ordinarily happeneth among us. Again, if a foreign Prince invades our Coasts, or sets upon the King's Navy at Sea, hereupon a real, though not a solemn, War may, and hath formerly arisen. Such was the Spanish Invasion in 1588. So that a State of War may be between two Kingdoms without any Proclamation or Indiction thereof, or other matter of Record to prove it. *Idem 164.*

VII. That War, according to the Law of Nations, may be Solemn, two things are requisite: First, That it be waged on both sides by his Authority who hath the highest Power in the Commonwealth. Secondly, That certain Rights be used (of which we shall speak in due place) one of these without the other (because they are both required) doth not suffice. Publick War less Solemn may want those Rites, and be waged against private Persons, and have for the Author any Magistrate. And according to the opinion of most Civilians, if the matter be considered without Civil Laws, it seemeth that every Magistrate hath right to wage War, as for the defence of the People committed to his Charge, so for the Exercise of Jurisdiction, if he be opposed by Force: But because by War the whole Commonwealth is endangered; therefore by the Laws of all Nations that War be not undertaken without the Authority of him whose Power in the Commonwealth is the highest, there is extant such a Law of *Plato's*, and in the Roman Law it is called Treason in him who, without the Command of the Prince, hath

*Uk. de Leg. l. 3.
D. ad leg. Jul.*

maj.

waged War, or lifted Soldiers, or raised an Army; in the *Cornelian* Law brought in by *L. Cornelius Sylla* it was, *without the Command of the People*; in *Justinian's* Code is extant a Constitution of *Valentinian* and *Valens*, *None have leave to take any Arms without our knowledge and direction.* And my Lord Coke in his Third Institutes observes, That by the Common Law of this Realm it was High-Treason * to levy War without Authority from the King, for to him it belongeth only. And the Reason why it should be so subjected is, because that natural Order for preserving of peace among Men requires that an Authority and Council in undertaking of War should remain in Princes. War against the King, by the Statute; and it must be in his Realm. Therefore private Quarrels, tho' carried on *more guerrino* among the great Men, did not amount to the levying of War.

The Realm of England comprehends the narrow Seas. *Idem.* p. 154.

VIII. But as all Laws must be interpreted by Equity, so must this Law; and therefore there is no Question but that 'tis lawful for one having Jurisdiction, by force of those which we call a peaceable Guard or Power, *viz.* Constable, Serjeants, Watchmen, &c. to constrain a few disobedient Persons as oft as there's no need of greater Power to that purpose, and no imminent danger to the Commonwealth. Again, if it be so present a danger, that time will not admit of Consultation with him who hath Supreme Power, here also necessity affordeth another Exception; and therefore in Garrisons, if the Townsmen should endeavour to fall over to an Enemy, they may be dealt withal as Enemies by the Governor of the Garrison, and by that Right *L. Pinarius*, Governor of *Enna*, a Garrison in *Sicily*, having information

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tion that the Townsmen were falling off to the *Carthaginians*, making slaughter of them kept the Town: And the reason why such extraordinary Force is called War, is, for that the same is commenced by the right of the Magistrate, in which case the War is supposed to be made by the highest Power, because every one is judged Author of that which he giveth another Commission to do; besides the universal reason which warrants the act, requires that all Dangers, Rebel- lions, and Insurrections be withstood and checkt in the very bud, and tho' this is called War, yet this strictly is not properly War, tho' the parties who suppress or punish are impune.

Our Author would be understood here of War within the Realm.

But War solemn or unsolemn with Enemies out of the Realm, are both equally War. See 1. *Hale's Hist.* 163. shewed above, *Sec.* 6.

IX. But War properly by the Laws of this Realm or *Solemn*, is, when the Courts of Justice are shut up, and the Judges and Ministers of the same cannot protect Men from violence, nor distribute Justice: So when by *Invasiōn, Insurrection, Rebellion*, or the like, the current of Justice is stopt and shut up, *Et silent leges inter arma*, then it is said to be time of War, and the Trial of this is by Records and Judges of the Courts of Justice, and not by a Jury. So likewise War by the Laws of *England* is when the King's Standard and Host enter the Realm of another Prince or State, and hath been there by the space of Forty Days, for till then the War is not properly said to be begun.

14 Ed. 3. tit. Scire facias 122. inter Mortimer and the Earl of Lancaster.

Trin. 7 Ed. 3. fol. 29.

X. Wars, though undertaken by publick Authority, must have the Effects of Law, that is, there must be a just cause for the undertaking the same; so that *Alexander*, for

Grot. de jure belli et pa. lib. 2. c. 1. §. 1.

*Seneca de bene-
fic. l. c. 13.*

** Ego vos te-
stor, Populum
illum injustum
esse, neque jus
perfolwere.*

for that without cause he warred upon the
Perfians and other Nations, is by the *Scy-
thians* in *Curtius* and by *Seneca* too deserved-
ly called a Robber. For take away Justice,
and what are Kingdoms but great Robberies?
Therefore the just cause of taking Arms
must be the Iniquity, or, as we understand
it, the Injury of the adverse Party, accord-
ing to the Words used in the antient Denun-
ciation of the Roman Heralds, * *I call you
to witness, that People is unjust, and doth not
perform what is Right.* Now that is unjust
which hath a necessary repugnance to the
rational and social nature. Now amongst the
first principles of Nature there is nothing ne-
cessarily repugnant to War, there is much in
favour of it; for the end of War, the con-
servation of Life and Members, and the
keeping or acquiring of things useful unto
Life is most agreeable unto those Principles:
And if need be, to use Force to that pur-
pose is not disagreeable, since every thing
hath by the Gift of Nature strength, to the
end it may be able to defend and help it-
self, and therefore *he is by Nature fitted for
Peace and War; though coming into the World
unarmed, yet he hath a Hand fit to provide
and handle Arms.* Moreover right Reason
and the Nature of Society inhibits not all
Force, but what is repugnant to Society,
that is, which depriveth another of his Right;
for the end of Society is, that by mutual Aid
every one may enjoy his own. And this
were so, although the Dominion and Pro-
priety of Possessions had not been intro-
duced; for Life, Members, Liberty would
yet be proper to every one, and therefore
could not without Injury be invaded by
another,

another, and to make use of what is common, and to spend as much as may suffice Nature, would be the right of the occupant, which right none without Injury could take away: And that is made evident, since by Law and Use, Dominion is established, and that appears by the Orator, *Ut si nuncquod-* Tully's Offic. 3.
que membrum sensum suum haberet, ut posse putaret se valere si proximi membri valetudinem ad se traduxisset debilitari & interire totum corpus necesse est: And applying that, says, So if every one of us snatch unto himself the commodities of other Men, and draw away from every one what he can to advantage himself, human Society cannot stand, Nature gives leave to every man, in the acquisition of things useful, to supply himself before another: But by the Spoils of another to increase his own Store, that Nature doth not permit. It is not then against Society to provide for one's self, so that another's right be not diminished; nor is that violence unjust which doth not violate the Right of another. Of the two kinds, Contention by debate and by force, the one agreeing to Men, the other more becoming Beasts, we must fly unto the latter when the former would not serve. The incomparable *Ulpian* says, *Cassius* writes that it is by Nature lawful to repel Force by Force, and Arms by Arms. And this is further proved out of Sacred History; for when *Abraham* having armed his Servants and Friends, pursued the four Kings that spoiled *Sodom*, and returned with Victory and Spoil of the Enemy, God by his Priest *Melchisedeck* approved his Action, Blessed be the most High God, said *Melchisedeck*, who hath delivered thine Enemies into thine Hand. *Abraham*, as appears by the Story, had taken Arms

Leg. 1. § 8.
 vim vi. D. de
 vi, & vi. ar-
 ma. a.

Gen. xiv. 18.

Arms without any special Commission from God; therefore the Law of Nature was his Warrant, whose Wisdom was no less eminent than his Sanctity; nay, God himself hath prescribed to his People general and perpetual Laws of waging War, thereby shewing that Wars may be just, even without his special Mandate; for he doth plainly distinguish the Cause of the seven Nations (in which God gave a special Mandate for the destroying of them, which is properly called the Wars of God, and not of human Counsel) from the Cause of other People, and prescribing nothing about the just Causes of entering into War, thereby shews them to be manifest enough by the Light of Nature, as the cause of the defending of the Frontiers in the Wars of *Jephtha* against the *Ammonites*, and the cause of Embassadors violated in the Wars of *David* against the same People.

XII. By the Law of Nature, in War those things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwise obtain, or else is such a mark as does infer Damage to the guilty party by a fit measure of Punishment; and by the Laws of Nations, not only he that wages War on a just Cause, but every one in solemn War, and without end and measure, is Master of all he taketh from the Enemy in that Sense, that by all Nations, both himself and they that have Title from him, are to be maintained in the Possession of them; which as to external Effect we may call Dominion; *Cyrus*, in *Xenophon*, it is an everlasting Law among Men, that the Enemies City being taken, their Goods and Money should be the Conquerors; for the Law in that matter is a common

*Xenoph. 5. de
Instit. Cyri.*

mon Agreement, whereby the things taken in War become the Takers. From the Enemy are judged to be taken away those things also which are taken away from the Subjects of the Enemy, and Goods so taken, cannot by the Law of Nations be properly said taken, but when the same are out of all probable hopes of recovery, that is, as Pomponius observes, brought within the bounds or guards of the Enemy; For, says he, such is a Person taken in War, whom the Enemies have taken out of our, and brought within their Guards, for till then he remains a Citizen. And as the

Arist. 1. Polit.

Hujusmodi res non tam capta quam recepta intelligitur.

per D. per Pomponius Leg. in Billa Parag. Siquis servum in par. de capt. post.

Law of Nations is the same reason of a Man, so likewise of a thing; and therefore Goods and Merchandize are properly said to be the Captor's, when they are carried *Infra Præsidia* of that Prince or State, by whose Subjects the same were taken, or into the Fleet, or into a Haven, or some other place where the Navy of the Enemy rides: For then it is that the recovery seems to be past all hope. And therefore the common Law of this Realm calls such a taking a *Legalis Captio in Jure Belli*, and in 7 R. 2. an Action of Trespass was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in *le haut Mere ou les Normans queut sont Enemies le Roy*: And it was adjudged that the same Plea was good. And, in the year 1610, a Merchant had a Ship and Merchandize taken by a Spaniard, being an Enemy; a Month after a Merchant Man, with a Ship called *The little Richard*, retakes her from the Spaniard: It was adjudged, that such a possession of the Enemy, divested the Owner of his interest, and the retaking afterwards in Battle, gained the Captors a Property.

1. Hale's Hist. Pl. Cr. p. 163.

2 R. 3. fol. 3.
7 R. 2. Trespass Statbam, Pl. 54.

M. 8. Jac. B. R. 2 Brownlow 11. 7 Ed. 4. 14. a. 24. Ed. 3. 16, 17. Lucas, 79.

XIII. 'Tis true, the Civilians do hold, That it is not every Possession that qualifies such a Caption, and makes it become the Captor's; but a firm possession (that is) ¹ *Hale's Hist. Pl. Cr. p. 163.* when the Prize doth *pernoctare* with the Enemy, or remain in his possession by the space of 24 Hours; but as this is a new * Law, [•] *Consulatu Maris, c. 283.* so it is conceived to be against the antient Judgments of the Civil Law, as well as the modern Practice of common Law: For the Party in the antient Precedents doth not mention by his Plea, that the Prize did *pernoctare* with the Enemy, but generally, that the same was gained by Battle of the Enemy. ^{287. *Constit. Gallica, l. 20.*} ^{tit. 13. art. 24.} ^{7 R. 2. Trespass Statute, Pl. 54.}

XIV. This right of changing of Dominion or Property by force of Arms, is so odious, that in the taking of Goods, if by any possibility the right Owners may have restitution, the same hath been done. And although a larger time than 24 Hours happens between the capture and recapture, and so it may *pernoctare* with the Captor, yet restitution may be made; and therefore if one Enemy takes the Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a Neuter Nation, the Owners may seize her, and the Admiral of that Neuter Nation may in some cases restore the Ship and Goods to their Owners, and the Persons captive to their former liberty; the reason is, for that the same ought to have been brought *infra Præsidia* (a) of that Prince or State by whose Subject she was taken.

A *Dunkirker* having seized a *Frenchman's* Vessel, *super altum Mare*, sold the same with her lading at *Weymouth*; whither it had been driven before she was brought *infra Præsid.* ^(a) *Dom. Reg. Hispania: The Frenchman coming into*

(a) *Res quæ intra præsidia perductæ nondum sunt, quam ab hostibus occupatæ, Dominum non mutarunt ex Gentium jure. Grotius de jure Belli ac Pacis, l. 3 c. 9. §. 16.*

into Port, there claims the benefit of the Laws of Nations, the King of *England* being then in amity with both their Princes, and that restitution be made; in which case it was resolved by all the Judges, (b) That (b) *March*, if there be a Caption by Letters of *Marque* 110. or *Piracy*, and the Vessel and Goods are not brought *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the same will not divest the Property out of the Owner; with this agrees the Law Civil, and restitution may be made. For this is not an absolute property immediately vested in the Captor upon the taking; but a conditional property to answer the original Debt or Damage, which cannot be done without a judicial Adjudication, the opportunity of which he hath lost by bringing the Prize into the Country of another Prince: For, as to private War, their Countries are as an Asylum.

XV. But if the Ships of War of Nations in enmity meet at Sea, and there be a caption, if there be that which is called a *firm possession*, the *Neuter Nation* cannot re-deliver or make restitution of the thing so acquired: And so it was adjudged, where *Samuel Pellagii*, with a Ship of War of the Emperor of *Morocco*, took a *Spanish* Ship, and brought the same into *England*, that he could no ways be questioned for the same *criminaliter*, or restitution to be made *civiliter*; for that the King of *Spain* and the *Morocco* Emperor were Enemies, and the King of *England* in Amity with both, and that such a caption is not called *Spoliatio*, sed *legalis captio*, in which there can be no restitution made, upon neither of the Statutes of 31 H. 6. cap. 4. or 27 Ed. 3. cap. 13. for

Per leg. libertas, & de leg. Jur.

See Chap. x. S. xix.

1 Ro. Rep. 175. 3 Bullstro. 28. The getting of Letters of Reprisal against a Nation, does not make a War between both States; nor can they be said to be at Enmity.

22 E. 3. fol. 13. Coram Rege &

he

*Concilio suo in
Camera Stella-
rum Michael.
2R. 3. fol. 2. A.*

he that will sue to have restitution in *England* for Goods taken at Sea, must prove, *That the Sovereign of the Party was in amity with the King of England.* Secondly, *That he that took the Goods, his Prince was at the time of the taking in amity with the Sovereign of him whose Goods were taken.* For if he which took them, was in enmity with the Sovereign of him whose Goods were taken, then the same will not amount unto a depredation or robbery, but a lawful taking, as every Enemy might take of another.

*7 E. 4. 14.
13 E. 4. 9.
22 E. 3. fol.
23. 2 R. 3.
fol. 2.*

*27 E. 3. c. 13.
31 H. 6. c. 4.
3 Bul. 28.
1 Ro. Rep. 175.*

A *Spanish* Merchant, before the King and his Council, in *Camera Scaccarii*, brought a Bill against divers *Englishmen*, wherein setting forth *quod depradatus & spoliatus fuit*, upon the Sea, *juxta partes Britanniae per quendam Virum Bellicosum de Britannia, de quadam Navi*, and of divers Merchandizes therein, which were brought into *England*, and came into the Hands of divers *Englishmen*, naming them, and so prayed process against them; who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the King of *England*, they ought not to answer. It was there resolved, *Quod quisquis extraneus*, who brings his Bill upon this Statute to have restitution, *debet probare quod tempore captionis fuit de amicitia Domini Regis*; and also, *quod ipse qui eum ceperit, & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis quærentis, tempore spoliationis, & non Inimicus Domini Regis, sive Principis quærentis: Quia si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum.*

But

But if the King of *England* is in enmity with the *States of Holland*, and one of their *Ships of War* takes a Merchant-Man of the King of *England's*, and afterwards another *Ship of War* of *England* meets the *Dutchman* and his Prize, and in *aperto praelio*, regains the Prize, there restitution is commonly made, the Owners paying the *Salvage*: So where the Prize is recovered by a *Friend in amity*, or comes into his *Ports*, restitution is likewise made; but when such Goods become a lawful and just prize to the Captor, then should the *Admiral* have a tenth part; following the religious example of *Abraham*, after his Victory over the five *Kings*.

Hujusmodi res non tam capta, quàm recepta intelligitur:

per D. Leg.

Pomponius, &

per Leg. in Bel-

lo Par. si quis

servum in pr.

de Cap. & post.

Per Leg. post-

liminii, Par.

Postliminii. de

Cap. & postli.

Boyce & Cole, vers. Claxton, Hill. 26, & 27 Car. 2. in B. R. Restitution made formerly by a French-Man, who had regained an English Prize out of the Hands of a Dutch Man of War.

XVI. He that is an Enemy, may every where be assaulted, according to the Laws of Nations. Enemies may therefore be attacked or slain on our Ground, on our Enemies, or on the Sea; but to assault, kill, or spoil him in a *Haven* or *peaceable Port*, is not lawful; but that proceeds not from their Persons, but from his right that hath *Empire* there, for Civil Societies have provided that no force be used in their Countries against Men, but that of Law, and where that is open the right of hurting ceaseth. The *Carthaginian Fleet* was at Anchor, in *Syphax Port*, who at that time was at Peace with the *Romans* and *Carthaginians*; *Scipio* unawares fell into the same Haven, the *Carthaginian Fleet* being the stronger, might easily have destroyed the *Romans*; but yet they durst not fight them. The like did the *Venetian*, who hindered the *Greeks* from assaulting the *Turkish Fleet*, who

Sir Walter Raleigh, l. 5. c. 3. §. 17.

rid at Anchor in a Haven, then under the Government of that *Republick*; so when the *Venetian* and *Turkish Fleet* met at *Tunis*, though that very Port acknowledges the *Ottoman* Emperor; yet in regard they are in the nature of a *Free Port* to themselves, and those that come there, they would provide for the peace of the same, and interdicted any hostile attempt to be made there.

History of the
Republick of
Venice in Anno
1638. and fol.
447.

The *Corfsairs* having been in the *Gulph*, put into the Port of *Vallona*, which is subject to the Turk; whereupon *Capello*, Provveditor-General for the *Venetian*, and Captain of the *Gulph*, having notice of the same, made into the Port; and though the *Ottoman Port* had by Treaty permitted the *Venetian* to pursue the Pirates in all Places, and forbad their Commanders to protect or shew them any Favour, yet the Castle interdicted, and forbad the *Venetian* General with Cannon to attack them; for it was nevertheless intended by the Treaty that the Peace of Ports must be preserved.

Fuller's Holy
War, l. 4. c.
23.

And the same Republick having War with those of *Genoa*, met, at *Tyre*, *Reinerius Zenus* Duke of *Venice* with the united Power of the *Venetians* and *Pisans*, counting no fewer Number than 74 Vessels well provided, and would have engaged in the very Haven, but were there interdicted by the Governor; but yet with this Proviso, that if by consent they would go out of the Protection of the Port, and at open Sea decide the cause, they had then freedom: And accordingly they sailed forth and engaged. The like not long since happened between *Cornelius de Wit*, Commander of a Ship of War of the *States General*, and Captain *Harman*, Commander of one

one of His Majesty's Frigates at *Cales*, a Challenge being made in that Port by the first, and as briskly accepted by the latter, but both were interdicted the execution of the same in the Port, but out of the protection of the same they might decide the Question; the which they did to the no small Fame of the last; for in that dispute, of 380 Men then aboard the *States Man* of War, there were scarce 100 whole Men in her, and *Harman* having entered and taken her, brought her at his stern in Triumph to the Port again.

Jun. Anno.
1672.

But they of *Hamburg* were not so kind to the *English*, when the *Dutch Fleet* fell into their Road, where rid at the same time some *English Merchant-Men*, whom they assaulted, took, burnt, and spoiled; for which Action, and not preserving the Peace of their Port, they were by the *Law of Nations* adjudged to answer the damage, and I think have paid most or all of it since. But Enemies in their own Ports may be assaulted, burnt, or destroyed by the Laws of Arms.

Anno 1665,
1666. *Bell.*
Angl. cum Ba-
tarv.

This is *Jus*
belli, & in
Republica

maxime conservanda sunt Jura Belli. Reg. fol. 129. Arrest fact super bonis Mercator. alienig.

XVII. If the Ships of any Nation happen to arrive in any of the King of *England's* Ports, and afterwards, and before their departure, a War breaks out, they may be secured, privileged without harm of Body or Goods; but under this limitation, till it be known to the King, how the Prince or Republick of those, whose Subjects the Parties are, have used and treated those of our Nation in their Ports. But if any should be so bold as to visit our Ports after a War is begun, they are to be dealt with as Enemies.

Grot. de Jure belli & pacis lib. 3. c. 11. Sec. 12.
Some of old have held that *Clericus, Agri-*
cola & Mercator
tempore bel-
li ut colat, com-
mutet, orique
pace fruuntur
Co. 2. Instit.
fol. 58.

XVIII. By the Laws of Nations generally all things are the Captor's which he takes from his Enemy, or which his Enemies gained from another by Force of Arms; so likewise all those Goods that he shall find in his Enemies custody: But then it must be apparently manifest, and evidently proved, that it is really the Enemies; for if an *English-Man* should have Goods in the custody of a *Dutch Factor* at *Cales*, and a War should break out between that *Prince* and that *Republick*, yet are not the Goods of the *English-Man* subject to the seizure of the *Spaniard*, it being apparent, that the Owner is not a Subject of their Enemies: So likewise if the Goods of *Friends* are found in the Ships of *Enemies*, this does not *ipso facto* subject the same to be prize by the Laws of Nations; though it be a violent presumption, and may justly bear a legal examination, till which there may be a securing of the prize, till adjudication shall pass. So on the other hand, if the Ships of *Friends* shall be freighted out to carry the Goods of *Enemies*, this may subject them to be prize, especially if the Goods shall be laden aboard *by the consent or privity of the Master or Skipper*; though in *France* they have subjected and involved the innocent with the nocent, and made both of them prize. In the late *Flemish Wars* with *England*, the *Ostenders* became obsequiously serviceable with their Ships to the Traffick and Commerce of both Nations. Memorable was the Action, when the War was between the two Republicks, *Venice* and *Genoa*, the *Grecian* Ships being then employed, (as those of *Ostend*) were searched, and the Enemies pulled out, but no other matter done: However it is most certain,

Consul. Marit.
c. 273.

*Hofis fit ille,
& qui intra
praesidia ejus
sunt: Let him
be our Ene-
my, and they
that are with-
in his Guards
Liv. lib. 37.
& alibi passim.*

Gregor. lib. 9.

certain, let the *Commission* or *Protection* of such Ships be what they will, if Men will venture to trade under such a Cloak, it behoves them, that the *Skipper* and his *Crew* be entirely ignorant; for it is his action that will go far in the freeing, or making absolute the Prize, and Goods so made prize, the property is immediately gone and changed, be the Owner who he will, he never can claim the same; for the Laws of Nations made the Enemies first Masters by External Dominion, and then by Conquest gave the property to the Captor: Following that Judgment of the Romans, *Whatsoever they got of their Enemies by Valour, they would transmit to their Posterity by Right.*

*Romanos honestissimas eas
atque justissi-*

mas credimus possessiones quas Belli Lege captas habemus; neque vero induci possumus ut stulta facilitate deleamus virtutis monumenta, si eas illis reddamus, quibus semel perierunt: Imo vero tales possessiones, non tantum cum his qui nunc vivunt, civibus nostris communicandas; sed & posteris relinquendas censemus: Tantum abest ut parva relinquendo in nos ipsos ea constituamus, quæ in Hostes constitui solent: Titus Lægius his opinion in the Senate of Restitution: We Romans believe those possessions to be most honourable and just, which we have taken by the Law of War; nor can we be induced by a foolish Facility to part with the Monuments of our Valour, and restore them to those that were not able to keep them; nor do we judge such possessions to be communicated only to our Country-Men now living, but to be left to our Posterity. So far are we from relinquishing what we have got, and dealing with ourselves, as if we were our own Enemies. De Reij idem in Romulo narrat Plutarchus.

XIX. 'Tis not against Nature to spoil the Goods of him, whom it is lawful to kill; and by the Laws of Nations it is permitted that the Goods of Enemies may be as well spoiled as taken; and *Polibius* observes, That all things of the Enemies may be spoiled, their Ships, Goods, Forts, &c.

*Hist. 5.
Grot. de jur
belii & pacis
lib. 3. c. 12
§. 1.*

XX. And though it may happen sometimes that a War may break out, and there

Owen, 45.
but *quære* of
the Case.

may be no publick denouncing or proclaiming the same; that if a Friend or Neuter should assist an Enemy with *Contraband Goods*, that is, Arms, &c. whether upon such a caption the Goods may be made prize; the resolution of which will depend on these Considerations.

First, By natural Law, *where either force offered, is repelled, or punishment exacted of one that hath offended, and is denied*, there needs no denunciation; for Princes are not to stand debating with Words and Arguments, being injured beyond Words: *For War undertaken to resist violence, is proclaimed not by an Herald, but by Nature*: For it is no more than the invading of one for another, or taking of the Goods of the Debtor, to answer the Creditor's damage.

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republics having received injuries, may apparently shew that they had no other way to recover their own, or that which is due to them: for such *Interpellation* following after injuries committed, constitutes that Prince or State in a fault *that shall not render satisfaction*.

Vid. Mari-
nam 27. 13.
1. Hale's Hist.
Pl. Cr. p. 161,
162, &c.

Denunciation is either conditionate or pure: Conditionate where it is joined with remanding of things, and in the name of *res repetita* the Heralds Law, called *Jus feiale*, compre-

Thirdly, Admitting that *Interpellation* hath gone, and satisfaction hath been required for the damage, and no satisfactory return hath been made, whether then the Ships or Territories of the enemy may be assaulted: And for that it has been conceived they may, for denunciation is no more but to signify that the Parties, against whom the same is commenced, *are unjust and will not do right, and therefore War is begun by the Supreme Power*. Now Princes or Republics having done that which
by

the Law of Nature they were not obliged to do, that is, after a wrong done, abstained from War by Friendly demanding of Satisfaction or Reparation (which is required only by the Laws of Nations) and public Justice being denied them, there remains no other or further obligation on the State, the same amounting to, and indeed is an apparent *defiance*; and *Proclamation* is no other.

hended not only vindication by right of Dominion, but also the prosecution of that which is due upon a civil or criminal cause. *Severus.*

XXI. True it is, that while the *Romans* were uncorrupted in their Discipline, they
— ad 10. *Æn.* explains it rightly,
 thence was that in the Forms *to be rendered, to be satisfied, to be yielded*, where to be yielded, as we have said elsewhere is to be understood, unless they that are called upon will rather punish the guilty themselves: This requiring of things *Pliny* testifies was named *Clagitation*, *lib. 8.*

were religiously scrupulous in beginning a War; for they never sent forth their Armies till they had sought for Justice in the tracts of Peace, and after the publick promulgation of their intent. Such also was the integrity of the *Achæans*, before they had forewarned the enemy to a defence. *Machiavel* commends the simplicity of the antient *Florentines*, that enterprized no hostility on their neighbours till they had, by ringing a Bell for the space of a whole month, summoned them to a peaceable satisfaction or a brave resistance: But these Customs and Institutions are only of some Countries, not from the Law of Nations. The white Rod among the *Greeks*, the Turfs and Bloody Spear among the *Equicolas*, renunciation of Friendship and Society (if there had been any) thirty solemn days after satisfaction demanded, * are rather introduced by that which we call the Custom or Law of particular Kingdoms and States, which did

* The throwing of the Spear, and such sort of Customs

not belong to States; for there may be War no Question the Law of introduced, without any solemn Proclamation, as the violation of Ambassadors, by in process of time became obsolete; nay the third Punick War was at once indicted and begun, *Varro, lib. 4. de l. Phil. Arlanibæus Arma Suecica, fol. 13, 37. Touch de Jure Feciali, part. 2. sect. 10. qu. An bellum aliquando ommissa indictio- ne movere liceat?*

Diffidato Princeps, diffidati sunt ejus adherentes. Bal- dus ad Leg. 2. C. de Serv. n. 70.

Liv. lib. 36.

Reason *Gustavus Adolphus* invaded † the German Empire, without ever declaring War, to revenge the contumelious usage of his Ambassadors at *Lubeck*. The form of denunciation of War is either conditional, or absolute; Conditional, when restitution or satisfaction is demanded at the same time that the War is denounced. A pure or absolute denunciation, is that which especially is called an Indiction or Proclamation, which is either when the other Party hath already begun the War, or when he himself hath committed that which deserves to be punished. See *Examples, Grot. lib. 3. c. 3, 8, 7.*

XXII. But if War be indicted, or is begun, against him who hath the highest power over the people, it is supposed to be proclaimed against all his, not only Subjects, but those who will join themselves unto him, as being an accession to his party. And this is that which the Law interprets, *the Prince being defied, his adherents also are defied*; for to proclaim a War is to defy, which is to be understood of that same War which is waged against him to whom it is indicted, as when War was denounced against *Antiochus*, they were not pleased to denounce it against the *Ætolians* apart, because they had openly joined themselves with *Antiochus*: The Heralds answered, *Ætolians have declared War of their own accord against themselves*; but that War being ended, if another People or King, for supply

supply of Aids, is to be warred against, that the effects of the Laws of Nations may follow, there will be need of a new Indiction, for now he is not looked upon as accessary, but principal: Wherefore it is rightly said, That by the Law of Nations, neither the War of *Manlius* upon the *Gallo-Greeks*, nor of *Cæsar* upon *Ariovistus* was lawful. For they were not assaulted now as an accession of a Neighbour's War, but principally: To which purpose, as by the Law of Nations Indiction, so by the Roman Law a new Command of the Roman People was necessary. For what was said in the proposal against *Antiochus*: *Was it their Will that War should be entered with King Antiochus and those that followed his Party* (which was observed also in the Decree against King *Perseus*) seems truly understood so long as the War continued with King *Antiochus* or *Perseus*, and those that really immixed themselves in that War.

XXIII. Now the true Reason wherefore Nations required Denunciation to that War which was said to be just by the Law of Nations, was not that Force should not be offered privily, or carried on by deceit, for that pertains more to the excellency of their Valour than to strict Right; (for some Nations (as we have read) have appointed their Enemy the time and place of Battle) but that it might certainly appear the War was not waged by a private undertaking, but by the will of either people or their heads. *Servius Honoratus* when he had deduced the Original of the Heralds Law from *Ancus Manlius*, and further from the *Equicole*, saith, *That if at any time Men or Beasts were by any Nation taken from the People of Rome, the*
Pater

Idem dici potest de bello sociorum Ulyssis in Cyconas Priamo quondam auxiliatos, de quibus Hom. Odyss. 1. 3 ibi Didymus.

Livius, lib. 36, 42.

*Tum certare o-
diis, tum res
rapuisse lice-
bit.*

Pater Patratus went with the Heralds (that is, Priests) who have Authority in making Leagues, and standing before the Bounds, with a loud voice pronounced the cause of the War; and if they would not restore the things taken, or deliver up the Authors of the Injury, he threw a Spear, which was the beginning of the fight, and thenceforth it was lawful, after the manner of War, to take the Spoil.

XXIV. War is not only lawful against those that are our Enemies, but likewise against those that supply them; but yet we must distinguish of the things themselves. For some things there are that have use only in War, as Arms: Some that have no use in War, as those that serve for pleasure: Some that have use both in War and out of War, as Money, Corn, Victuals, Ships and things belonging thereto.

1. It is plain, that by the first he is my Enemy that supplies my Enemies with things necessary for the War.

2. But by the second he is not, according to that of Seneca: *I will not help him to Monies to pay his Guards; but if he shall desire Marbles and Robes, such things hurt not others; only they minister to his Luxury: Soldiers and Arms I will not supply him with; if he shall seek for Players and Recreations to soften his fierceness, I will gladly offer to him: Ships of War I will not send him, but such as are for Pleasure and Ostentation of Princes sporting in the Sea. I will deny to give to one that purposes the destruction of another's Country those things that are essential, for it is a bounty not to be allowed of.*

*French and Dutch in en-
mity, and the
English neu-
ter with both,
the latter per-
mitted the
French King
to build a Ves-
sel of Pleasure
at Portsmouth,
which was
sent into
France, and
was no breach
of the Neu-
trality, Anno
1676.*

3. But in the third, which is a doubtful use, there the state of the War is to be considered: For if I cannot defend myself un-
less

less I intercept the things sent, necessity will then give right, but with the Burden of Restitution *, except some other cause accede; but if the apportation of those things hinders the execution of my right, and he could know so much who brought them, as if I had driven the Enemies fleet into a Port or Haven, or had straitened a Town with a Siege or Blockade, and were now in expectation of their yielding or compounding, there is no question but he that shall in such case succour my Enemy, ought in Justice be made liable for the Damage I have sustained through his means: Like a Goaler that shall wilfully suffer my Prisoner to escape; or one that hath rescued my Debtor justly detained by me for my damage, whereby I am injured, and according to the measure of my Loss his Goods also may be seized and brought into such a state, to the end I may obtain a just satisfaction. But if he hath not yet done any damage, but hath been willing to do it, there will be a right by retention or staying of the Ship and Goods to compel him to give caution for the future; but if my Enemies injustice towards me be most evident, and a Nation that ought to be Neuter confirm him in that most unjust War, in that case it will not only Civilly be liable, but Criminally as one that rescues a Pirate manifestly guilty from the Judge at the very Bar; and therefore it will be lawful to determine against him by such measures as are necessary and meet for his Offence: Wherefore within those rules, he may be spoiled of Ship and Lading; and that is the true reason why Indiction or publick Proclamation by internal right ought to be denounced, that so other Nations may see they have a just cause who commenced

* *Grotius in jure belli & pacis, lib. 3. c. 1. §. 5.*

The English drive the Dutch East-India Fleet into Bergen, and the Danes there protected them against the League and the Laws of Nations, for which the ensuing War was accounted just on the King of Britain's part. *Sylv. in verb. Restitut. p. 3. §. 12.*

menced the War, and that they ought not to be impeded in the acquiring due satisfaction.

And though Neuters are not compellable, by the rigour of War, to afford Assistance to either Party without the Will of the other, yet such may the emergency of the case be, that if enforced, they may lawfully declare, though to the damage of the weaker. Such was the case, when the *Venetians* had so far prevailed against the *Turks* in *Candia*, that *Canea*, which they then besieged by Sea and Land, was brought to that extremity, that in all human probability it must then have been speedily surrendered, the *English* Ships being then at *Smyrna*, and pressed by the *Turk* to assist the *Grand Signior* in the relief of that City. If the Persons whom the *English* had thus assisted, had been Christians, there is no question this Auxiliary Aid had been well; but to assist an Enemy of Christianity against Christians themselves hath seemed doubtful: But surely there seems little reason for such an Ambiguity; for if it be lawful to make League with those that are Aliens from the true Religion by the Law of Nature, then there can be no doubt but they may be aided. Now by the Law of Nature they may be entered into by Christians with such, for that Law is so common to all Men, that it admitteth not any Difference of Religion: Nor was the same universally forbidden by the *Hebrew* Law, as appears by *Abraham's* aiding the wicked *Sodomites* with his Arms; and that which was very remarkable, that the *Asmoneans*, being exceedingly skilful in the Law, and great Observers of the *Hebrew* Rites, yet made Leagues with the *Lacedæmonians* and *Romans* by the consent of the Priests.

*Laus eorum in
Thargum.*

*Vid. Carolum
Molin. tract.
2. disput. 112.*

Priests and People, yea and publickly offered Sacrifice for their safety: Nor were they forbidden by the Evangelical Law, according to that of *Tertullian*, who observes, That *Lib. 7. c. 3.* so long as *Israel* was only his People, God did justly command mercy towards their Brethren alone; but after that, he gave unto *Christ* the Nations for his inheritance, and the ends of the Earth for his possession, and that began to be paid which was promised in *Hosea*, *They that were not my People shall be my People, and the Nations that had not obtained mercy shall obtain mercy*; From that time *Christ* hath extended unto all the Law of fraternal benignity, excluding none from our Compassion, no more than from his Vocation: From whence it follows, that the action of those Captains being then in the power of the *Turk*, was lawful in the assisting them against the *Venetians*.

Vide the Case at large in the end of this Chapter.

XXV. And altho' the Goods of Friends, *Jus sociale.* according to the circumstance of the case, may be preserved by adjudication, and restored to their owner; yet all manner of Goods have not that privilege: For though the *Freedom of Trade* preserves the Goods of Friends, against the rigor of War, yet it does not those Goods that supply the Enemy for War, as Money, *Viſtuals*, Ships, Arms, and other things belonging thereto: For to supply an Enemy that invades our right, or seeks the destruction of our Countries, is a liberality not to be allowed of, and it certainly stands with necessity, that if I cannot safely defend myself, or endamage my Enemy without intercepting the things sent, it may justly be done: But when such goods are seized, whether they give the Captor a right of Property, or right

Vide Treaty 1 Dec. at London 1674. Art. the third, what is meant by Goods contraband or prohibited Merchandize.

Camden vide
Ann. 1589.
1595.

right by Retention, to compel that neuter Nation to give Caution for the future, by *Hoftages* or *Pledges*, not to supply the Enemy, may be a question. The *Romans* who had brought Victuals to the Enemies of *Carthage*, were taken by the *Cartbaginians*, and again rendered upon request; the *Hollanders* in the heat of the War between *Sweden* and *Poland*, never suffered themselves to be interdicted with either Nation; the same State when they had War with *Spain*, intercepted the *French Ships*, passing to or from *Spain*, but restored them.

Plutarch.

And *Pompey*, in the History of the *Mithridatick War*, set a Guard on the *Bosphorus*, to observe if any Merchant sailed in thither; whosoever did, and was taken, was surely put to Death; so *Demetrius* when he possessed *Attica* with his Army, having blockt up *Athens*, hanged up both the Master and Commander of a Ship, who attempted to bring in Corn: The *Hollanders* having blockt up *Dunkirk*, some *English Merchants Ships* did attempt to enter, but were denied by the *Hollanders*.

Meurfius in his
Danish Hist.
3 part 2.

Vide Tit. Customs.

Most certain, if a *Neuter Nation* had had notice of the War, and Caution given them (as is usual) not to supply the Enemy with the Counterband Goods, as they call them; if such be the case, the prize is become absolutely the Captor's. So Queen *Elizabeth* did when she seized on the 60 Sail of the *Hanfiatick Towns*, who were carrying of Goods, *ropas contrabanda*, to the *Spaniard* her Enemy; she condemned them, and made them absolute prize; For as neutrals are not compellable by the rigour of War, to give any thing against their Will, so must they not against the Will of each

CHAP. I. OF SHIPS OF WAR.

31

each Party afford such things as may damage one another. For Persons or Nations having had notice of the War, which is done, and Caution given sometimes by *Proclamation*, or some other publick Edict, signifying the right of their Cause, and shall afterwards gather to, and assist the Enemy, whether Associates, *Bald. ad l. 2. c. de Seven 70.* Neuters, or Subjects, the same yields a right, Under the Name of Contraband may be comprehended Arms only, as picces of Ordnance, with all Implements belonging to them, Fire-Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Halberts, Guns, Mortar-Pieces, Petards, Granadoes, Musket-rests, Bandaliers, Salt-petre, Muskets, Musket-shot, Helmets, Corsets, Breast-plates, Coats of Mail, and the like kinds of Armature; so for Horses and other Warlike Instruments. *Vide Marine Treaty between England and Holland, December 1, 1674. Art. 3. Vide the Attempt made by John Burrough, to trade with the Swede expressly against the Interdiction of the Danish King: Sir Walter Raleigh; l. 5. c. 1. §. 10.*

L. Æmelius Prætor accused the *Tejans* for So likewise victualling the Enemy's Navy, promising Ships Masts, them Wine, adding, That unless they would and whatso-
do the like for the Navy of the *Romans*, he thought or
would account them as Enemies; but com-ascertained
mon Experience hath taught Nations and capable of
Kingdoms, when they declare Neutrality, to arming an
make Provision by way of League with both Enemy.
the Nations at War, that when it should hap-*Bartol. l. nul-
lus nunc. lib. 2.
de Judeis Cas-
licolis.*
pen the Armies of both, or any draw towards
their Territories, it might be lawful for them

to

to exhibit the *Common Offices of Humanity* to both.

Anno 1650, or
1651. vide R.
Cooke of the
church's state
in equal dan-
ger with the
Trade.

It happened that about seven stout Merchant Men rode in the Port at *Smyrna*; the General of the *Venetians*, being jealous of their joining with the *Turkish* Armado, desired to know their Minds, who answered, they would prove Neuter in the Dispute; but afterwards (though at first the Captains all refused) upon the threatning of the *Grand Signior*, to lay an Embargo on all the Goods of the *English* Nation in his Dominion, and to make Slaves of their Persons; those Captains were forced to join with the *Turkish* Forces, who beat the *Venetians* from before *Canea*, and so reliev'd it; the *Venetian* Ambassador complained to the then Powers in *England*, but could have no Relief, being answered, *That those Ships being in the Turks Power, were subject to it*; the accident being such as made the Action lawful, as we have afore remembred.

Leagues may be made with Infidels, by the Law of Nature, and likewise by that of Religion, which is so equally indulgent to all Men, that it will not admit of any Difference upon the score of Religion, *Vid. Examples and Cautions. Grot. de jure belli & pacis, lib. 2. Cap. 15. §. 8, 9, 10, 11, 12.*

C H A P. II.

Of Letters of Marque and Reprizal.

- I. *Of Reprizals generally considered, and for what Causes awarded.*
- II. *Whether unlawful by the Law of Nature, and of the Roman Law.*
- III. *Where lawful by the Laws of Nations at this Day, and the reasons wherefore they are so received.*
- IV. *Of the Advantages that accrue universally by such Reprizals.*
- V. *Of the essential Causes or Grounds generally for the awarding Letters of Reprizals.*
- VI. *Of the essential Causes or Grounds particularly that are requisite before they can be awarded by the Laws of Nations and of this Realm.*
- VII. *Of the ordinary and extraordinary by the Laws of England.*
- VIII. *Whether the same creates a Debt in the Grantee, and whether the Execution may be suspended.*
- IX. *Whether the awarding the same amounts to a Breach of Peace.*
- X. *Of Letters of Reprizal extraordinary, where granted, and of what Force.*
- XI. *That it consists with the Interest of Princes, not only to prevent those things that may occasion reprize, but likewise not to deny the same, if there be ground sufficient.*
- XII. *The Difference of Injustice offered to Subjects and to Foreigners, and where the one is concluded the same and not the other.*
- XIII. *What is meant by denying of Right, and doing of Injustice, and where Reprizal takes rooting, and where not.*
- XIV. *Of Reprizals where awarded, for denying of common Justice, or those which are called Letters of Marque in Cases ordinary.*
- XV. *Not repairing the damage after Letters of Request creates a National Debt, and is the Foundation of Reprizal.*
- XVI. *Domicil not Origination subjects to reprize.*

OF LETTERS OF BOOK. I.

- XVII. Reprizal not grantable, if the Spoil was occasioned by War.
- XVIII. Of Persons exempted from Reprizal by the Laws of Nations, Canon and Civil Law.
- XIX. Where Ships and Goods are subject to reprize, and where not.
- XX. When Right is denied, whether Life is engaged, and whether Persons refusing to yield may be slain.
- XXI. Goods taken by Reprize where the Property is altered, and where not triable in the Admiralty.
- XXII. Where many Ships are present, and one becomes Captor, whether the Spoil must be divided, or remain his that became Master of the Prize.
- XXIII. Where the Grantee of Letters of Reprizal may become a Pirate notwithstanding such Commission.
- XXIV. Where a Miscaption creates not an Injury in the Grantee, nor subjects him to answer Damage to the Sufferers.
- XXV. Of the Duties incumbent upon the Captor, and whether the Goods taken are subject to pay Customs.
- XXVI. After the Debt and Damage satisfied, restitution of the Residue ought to be made.
- XXVII. Contribution, whether it can be by the Laws of England to him whose Goods are taken by Reprize.
- XXVIII. Where Commissions have been awarded for the enquiring of Depredations, under which the Parties have sometimes obtained Satisfaction.

Grot. de Jure I.
 Belli et Pacis,
 lib. 3. c. 2. §.
 4. 5.

R Eprisals, known to us by the Word Reprisalia, or Letters of Marque, in Law have other Appellations, as Pignoratior, Clarigatio, and Androlepsia, &c. in Imitation of that Androlepsia, among the Greeks, to seize the three next Citizens of that Place, whither the Murderer had fled, and was always given to him who required revenge of the Offender; the word (Reprisals) is from the French reprendre and Reprise, i. e. resumptio, that is, to retake or take again one thing for another, like our Saxon Withernam. Though the Act

Act is now become lawful by the Law (indeed *consent*) of Nations, yet must it have its Standard mark, for the same cannot be done by any private Authority, but only by the power of that Prince or Republick, whose Subject the injured Person is; nor is the same grantable by Authority, but where the Party injured has *Justice denied him*, or the same *illegally delayed*.

Reprizals are all one, both in the Common and Civil Law; *Reprisalia est potestas pignorandi contra quemlibet, de terra debitoris data creditori pro injuriis &*

damnis acceptis. vocabular. utriusque Juris. 27 E. 3. Stat. 2. cap. 17. 2 Inst. 204, 205.

II. By the Law of Nature no Man is bound for another's Act, but only the Successor of his Estate, for that Goods and Estate should pass with their *Burdens*, was introduced together with the *Dominion* of Things; hence it is, that the Son cannot be molested for the debt of his Father, * neither the Wife for the debt of the Husband, nor the Husband for the debt of the Wife; the same being against natural equity, that one should be troubled for the debt of another.

* *Leg. unica, c. ut null. ex vicinis c. ne uxor pro mar. & ne fil. pro patre, totis tit.*

So it is, that no particular Men owe, or are obliged for the debt which the Community owes, that is, if the Community have any Goods; but if Money be lent to a Community, each Particular is naturally bound, as they are a part of the whole, if the Stock publick be wanting. If one lends my Country Money (says Seneca,) I will not call myself his Debtor, yet will I pay my share. And again, Being one of the People, I will not pay as for myself, but contribute as for my Country. Naturally, nay, by the very Roman Law, * one Village was not bound for the other, nor one Man's Possessions charged for another; no not so much as with the Debts publick; the reason being

Ulpian. Leg. secut. sect. quod cuique universi. nom. Et singuli debent non tanquam proprium sed tanquam publicam publici partem. Seneca, lib. 6. de Benefic. c. 20. & cap. 19. Leg. nullam, c. de Execus. & Exactionibus.

added, *That it was against reason for one to be charged with the debt of another.*

III. And though by the *Law of Nature* one Man's Goods are not tied for the debts of another, no nor for those of the *Publick*; yet by the voluntary *Law of Nations*, the same might be introduced and brought in, and the same may stand well with the *Laws of Nature*; for that might be introduced by Custom and tacit Consent, when even Sureties, without any Cause, may subject and make liable their Goods and Estates for the Debts of a Stranger. So likewise that for any Debt, which any *Civil Society*, or the *Head* thereof ought to make good, or because the *Sovereign* or *Head* hath not done right in another's Debt, but hath made himself liable to render Satisfaction; such a *Society* may oblige and make liable all their Goods corporeal or incorporeal, for the Reddition of Satisfaction. Hence it was, as the great *Justinian* observes,

In Nov. Just.
52. 134. c. u-
nico de injuriis
in sexto.

Just. Inst. de
Jure Nat.

That this Custom was constituted by the *Nations*, grounded on the Urgency of human Needs, asserted with the greatest of Necessities: Since without this, great Licence would be given and tollerated for the committing of Depredations and Injuries; especially if only the Goods of Rulers were made liable, who seldom possess any thing, that, for Satisfaction, the injured may easily come by; whereas those private Men, whose Commerces are various, may be catcht for recompence, sometimes with the greatest ease, and

Baldus 3. conf.
58. *Bartol. de*
repress. q. 5.
ad ter. num. 9.

freest from Danger. Besides, the Owners of such Prize being Members of the same *Society*, might more easily obtain mutual right for satisfaction of the injur'd, and their own future indemnity than Foreigners could, who
without

without such a Tye would be very little regarded.

IV. Besides, the Benefit of this Obligation was common to all Nations, so that they which were one Time grieved with it, another time might be eased by the same. Moreover that this Custom was received, appears not only out of full Wars which Nations wage against Nations (for in these what is observed may be seen in the Forms of the ancient Denunciations. *Populis priscorum Latinorum, hominibusque, priscis Latinis bellum indico facioque.* Liv. lib. 1.

So likewise in the Proposal: *Vellent, juberent Philippo Regi, Macedonibusque* Lib. 31.

qui sub regno ejus essent, bellum indici. And in the very Decree or Proclamation itself:

Populus Romanus cum populo Hermundulo hominibusque Hermundulis bellum jussit) but also

Lib. 31.

Gellius, lib. 16. cap. 4.

where Wars are not come to that fulness of War, yet there is need of a certain violent Execution of Right, that is, imperfect War.

Agesslaus of old said to *Pharnabazus*, a Subject to the King of Persia. *We, O Pharnabazus,*

Plutarch Agesslaus.

when we were the King's Friends, carried ourselves like Friends towards all his, and being now become his Enemies, we carry ourselves like Enemies; wherefore seeing you will be one of the things that are his, we do justly oppose him in you. A species of this sort of Execution by Reprizal was that which the Athenians called apprehension of Men, of which the Attick Law (as Mr. Rous observes)

If one have force offered him and die, his Kinsmen and Friends may apprehend Men, till either the Manslayer be duly punished or yielded; but it is lawful to apprehend three Men and no more. By which it plainly appears, that for the debt of the City, which is bound to

Archæologia Attica.

Herod, to whom it was not lawful to make War against the *Arabians*, might lawfully use pignoration.

Joseph. lib. 6.

Liv. lib. 34.

punish her Subjects that have hurt others, is tied a certain incorporeal right of the Subjects, that is, the liberty of taking whom they please, and doing what they will: So that such Persons so taken by that Law, might be made Slaves, until the City did that which by Law she was obliged to perform. In like manner to recover a Citizen taken Captive by manifest Injury, are the Citizens of that City, where the Injury was done, retained by Reprize. Wherefore at *Carthage* they would not suffer *Ariston the Tyrian* to be taken; for, said they, *the same will befall the Carthaginians at Tyre, and in other Towns of Trade, whereto they often resort.*

V. A due Administration of Justice is not the least sense, wherein Princes are stiled Gods: To deny or delay Justice is Injustice; Justice is every Man's right, who hath not forfeited what he might claim by the *Jus Gentium*.

*C. Si sententiæ
c. 16. de Senet.
excom. in 6
constit. Leg.
qui restituere
de rei vindic.*

If therefore the Party cannot obtain his Definitive Sentence or Judgment, within a fit time against the Person of whom he complains, or if there be a Judgment given against *apparent Right* and Law; yet if no Relief can be had, the Bodies and Moveables of his Subjects, who renders not right, may be taken.

VI. In the Prosecution of which there must be,

1. The Oath of the Party injured, or other sufficient proof, touching the pretended Injury, and of the certain Loss and Damage thereby sustained.
2. A Proof of the due Prosecution for the obtaining of Satisfaction in a legal way.
3. Protelation or denial of Justice.

4. A Com-

4. A Complaint to his own Prince or State.
5. Requisition of Justice by him or them, made to the Supreme Head or State, where Justice in the ordinary course was denied.
6. Persistency still in the denial of Justice.

All which being done, Letters of Reprizal under such cautions, restrictions and limitations as are consonant to Law, and as the special case may require, may issue not only by the *Jus Gentium* and *Civile*, but by the *Magna Charta* C. 30. the latter antient and municipal Laws of the Kingdom*.

Clause. *Claus. 7. Johan. Reg. m. 22. Pat. 15. E. 3. part. 2. dorf.*
 48. *Pat. 23. H. 6. part 2. dorf. 14, 15.*

VII. The *Reprizals* grantable by the Laws of *England*, are of two sorts, *Ordinary* and *Extraordinary*. The *Ordinary* are either within the Realm or without, and are always granted where any *Englisch* Merchants or their Goods are spoiled, or taken from them, in parts beyond the Sea by Merchants Strangers, and cannot upon Suit, or the King's demanding of Justice for him, obtain the same, he shall have upon Testimony of such prosecution, a Writ out of the *Chancery* to arrest the Merchants Strangers of that Nation their Goods here in *England*; the which is grantable to the Subject oppressed of *Common Right*, by the *Chancellor* or *Keeper* of *England*, who always in such case hath the approbation of the King or Council, or both, for his so doing; the other, which is for satisfaction out of the Realm, is always under the Great Seal.

particular Persons upon particular Occasions; or, 2. General, which hath in a great Degree the Effect of a War, though it is not a regular War. See for more Matter the Place cited; or above, *Chap. 1. Sect. 6.*

VIII. But Letters of Reprizal granted in the *Ordinary* way for reparation out of the

*Leg. qui resti-
tuere de rei
vindic.*

*Vide Treaty
1666. Breda,
Art. 5.*

Quintilian.

Realm, which are always under the Great Seal of *England*, cannot be revoked, (though perhaps in point of State there may be a suspending the Execution of them for reason grounded on the publick good) and the reason wherefore they cannot be annulled or revoked is, because after the Person injured hath petitioned, and hath according to Law made out by proof his loss, and Letters of Request have gone, and no reparation made, then the Letters Patents of Reprizal being sealed, the same does immediately create and vest a National Debt in the Grantee, to be satisfied in such manner and by such means, as the same Letters Patents do direct out of the Goods and Estates of his Subjects, who refuses or protelates to do right (however, as the King hath the Legislative power of Peace and War in a publick Treaty for the Nation's good, they may be mortified, and then revoked by the Great Seal in pursuance of that Treaty.)

Nor do I see it an act unjust internal to deny the Execution of such Letters Patents, according to that of *St. Paul*, *All things are lawful for me, but all things are not expedient*. Now to the true Interpretation of the word *lawful* strictly, it is to do a thing without violating the Rules of Piety and Charity. Now there are many things amongst men which are not internally just, and cannot be done without violating the Laws of Charity, yet are lawful to be done, as in the Law of the *XII. Tables*, *the Creditors might divide the Debtor's Body amongst them*. So in acquiring satisfaction for Damages, the Lives and Goods of Innocents may be involved in Death and Destruction, whose peaceable Tract in Commerce

merce never gave them knowledge of this *privatum Bellum*, nor were they Actors in the Injury original. 'Tis true externally, according to that of *Lucan*, *That Prince or State justa negat. Omnia dat qui* that denies me right, gives me all. But the *Orat. pro* incomparable *Cicero* observes, *That there are Balbo.* some Offices to be done to them from whom you have receiv'd an Injury, for revenge and punishment must have a measure. Now if the supreme Power does think that the Execution of such Letters of Reprizal cannot well be effected without endangering the Peace of both Estates, there may be a just cause to respite the Execution till a time more convenient may occur, for that the Lives and Estates of thousands may be involved in the repairing of one Injury, private and peculiar: *Est enim aliquid quod non oporteat, etiam si licet. Idem pro Milone.* Nor do I see the same to appear repugnant to the Laws positive that have been made for the awarding those Commissions. 'Tis very true the † Statute reciting, " That at the † *Hen. 5. c. 7.* " grievous Complaints of the Commons of " *England*, who had suffered many Wrongs " and Injuries in the Loss of their Ships and " Goods upon the main Sea against Leagues, " safe-Conducts, and Truces which were " broken by the Subjects of other Nations, " the same Parliament reciting their willingness to provide Remedy and Relief for the " grieved, by spoil and injuries done unto " them beyond the Seas, upon Complaint " to the Keeper of the Privy-Seal (on full " evidence shewn) he shall sign Letters of " Request to demand restitution and reparation to the Parties grieved: Which if not " made in convenient time, then the Lord " Chancellor of *England* shall grant Letters " of Reprizal in due Form of Law for the In- " demnity

“demnity of the Persons interested and injured.” Yet this does in no respect restrain the King’s Prerogative and Authority, which he had at the Common Law in the judging the conveniency and time, when to be executed. Nor does the subsequent Statute †, reciting, “Whereas divers great Offences were often committed against Leagues, Truces and Amities between the King and other Princes or States, against safe-Conducts and Licences, and against the Laws and Statutes of the Realm (in that case made and provided) to the great slander of our Sovereign Lord the King, and the Damages of the good Subjects the Commons of *England*. It was therefore Ordained, Established, Enacted, and Confirmed by the Consent of the Lords Spiritual and Temporal, and Commons assembled in Parliament, That all Statutes and Ordinances against the Offenders of Leagues, Truces, safe-Conducts, and Amities shall be in full force, excepting the Clause in the Act which made it High Treason in the Second Year of *Hen. V.*” Therefore it is plain, there were Statutes made for the more effectual providing for the Subject, and Letters of Reprizals, they being granted long † before the Statutes, and the King’s Prerogative not the least diminished, but remaining at the Common Law to judge when expedient.

† *Johan. Reg. memb. 22.*

Pat. 15. Ed. 3.

part. 2. dor. f. 48

IX. And since the granting of Letters of Reprizal does not, in the ordinary way for particular satisfaction, amount to a breach of the Peace, I have thought fit for the excellency and care that is had in the composing and framing of them, to recommend one that was

granted upon Solemn Advice, and for the *Vide §. 15.*
Reasons therein mentioned. *postea.*

X. The *Extraordinary* are by Letters of *Marque*, for reparation at Sea, or any place out of the Realm, grantable by the *Secretaries* of State, with the like approbation, of the King or Council, or both; but they are only during the King's Pleasure, and to weaken the Enemy during the time of War, and may at any time be revoked.

XI. As Princes by the Laws of *Nations* are responsible for injuries *publick*, so should they by the most prudent ways imaginable prevent those that are *private*, not suffering Foreigners, if possible, to receive wrongs in their Countries: For, as the *Florentine* observes, *If a Man be exceedingly offended, either by the publick, or by any other private hand, in a Foreign Nation, and cannot obtain reparation according to Justice, he will never leave blowing the Coals, or cease promoting the injury, till the flame break out into War; in which he cares not if he see the ruin of that Kingdom or State, where he received his wrongs.* *Machiavel on his Tit. Liv. C.*
A Prince in this latter Age lost his Country but for a Load of Sheep-Skins. *Philip Comines in vita Caroli Ducis Burgund.*

Nor should the Prince or State of the Person injured, value his Misfortune at so low a Rate as to deny him Letters of Request, for that were to heap up injury upon injury; but likewise, if Justice be denied after such request, to arm him with power to take satisfaction by re prise, *vi, manu & militari.* *Leg. qui restituere de rei vindicat.*

Generally there always proceed Letters of Request, two or three, more or less; and according to the satisfaction, sufficient or insufficient, returned in answer to the same, Commissions are awarded.

XII. *Subjects* cannot by force hinder the Execution even of an unjust Judgment, or lawfully *Res judic. pro veritate habet.*

lawfully pursue their right by force, by reason of the efficacy of the power over them: But *Foreigners* have a right to compel, which yet they cannot use lawfully, so long as they may obtain satisfaction by Judgment. But if that ceases, then Reprizal is let in.

Et cum per injuriam Judicis domino rem qua debitoris non fuisset, abstulisset creditor, quasi obligatum sibi; & queritur an soluto debitori restitui eam oporteret; debitori Scævola restituendam probavit, Leg. scripturam ff. de distr. pign.

XIII. Now Judgment is obtained either in the Ordinary Course, by way of *Prosecution*, or *Suit*, or *Appeal* from the same, after Sentence, or Judgment given, to a higher Court; or else in the *Extraordinary* way, which is by way of Supplication, or Petition to the *Supreme Power*; but we must understand that to be, when the matter *in controversy* is, *tam quoad merita quam quoad modum procedendi*; not doubtful, for in doubtful matters the presumption is ever for the Judge or Court.

But the Reprizal must be grounded on wrong Judgment given in matters *not doubtful*, which might have been redressed one way or other; either by the ordinary or extraordinary power of the Country or Place; and the which was apparently *perverted* or *denied*.

But if the matter be doubtful, then otherwise; for in Causes dubious or difficult, there is a presumption always that Justice was truly Administred by them who were duly Elected to publick Judgments.

**Verus debitor, licet absolutus sit natura tamen debitor permanet. Paulus Leg. Julia D. de cond. in-debitor.*

XIV. And yet in this latter Case, some are of Opinion, that if the Case were dubious, and if the Judgment were against apparent Right, the Stranger oppressed is let into his satisfaction; and the reason is, because the Judge's Authority is not the same over *Foreigners* as over *Subjects*, for the reason above-mentioned.

If

If an *English* Merchant shall prosecute a Suit in the Ordinary Courts of the Law beyond Seas, and Sentence or Judgment shall pass against him, from which he appeals to the *Supreme Judgment*, and there the first Judgment or Sentence is affirmed, though the Complainant hath received a Judgment against the *real Right* of the Cause, yet this will be no cause for Letters of Reprizal, though perhaps it may occasion Letters of *Request* (if there be strong circumstances for the same) to have a rehearing of the Cause.

But if an *English* Man shall recover a Debt there, and then the Officer having the Debtor in Custody, will wilfully let the Prisoner escape, and then become insolvent, the same may perhaps occasion Reprizal.

In *England*, If a Foreigner bring an Action Personal against *I. S.* and the matter is found *special* or *general*, and the Party prays Judgment, and the Court refuses it; and then the Defendant dies, and with him the Action, (the nature of it being such) the Party is here without Remedy, the same may occasion Letters of Reprizal, if it be accompanied with those Circumstances that evince an apparent denial of Justice, *i. e.* as putting it off from *Term* or *Term* without cause.

Nulli vendemus, nulli negabimus, aut deferemus justitiam,
Grand Charter, Coke
2 Inst. 56.

An *English* Man pursues his Right in the legal Courts beyond Seas, and the Military Governor opposes the prosecution, and by force conveys away the Debtor and his Goods, the Sentence or Judgment is obtained: its ultimate end being *Execution*, being thus frustrated, may occasion Letters of Reprizal.

XV. Persons murder'd, spoil'd, or otherwise damnified in hostile manner, in the Territories or places belonging to that King, to whom

Case of Slaughter, Lee against the Governor of

Legborn, upon whom Letters of Request are issued forth, the Petition of if no satisfaction be returned, Letters of Re-
Gould and prizal may issue forth; and the Parties Peti-
Canbam mer- tioners are not in such cases compelled to re-
 chants, in fort to the Ordinary prosecution: But the
Nov. 1670, on Prince of that Country, against whom the
 which two Letters of Re- same are awarded, must repair the damage
 quest were sent to the out of his or their Estates, who committed the
 great Duke of injuries; and if that proves deficient, it must
Tuscany, for then fall as a common Debt on his Country.
 redress.

Such Letters of Request generally allot a
 † After the time † certain for Damages to be repaired,
 Massacre at if not, Reprizals to issue forth: A singular
Amboyne, and Example of which you will find hereunder.
 the other de- predations

committed by the *Flemings* on the *English*, his Majesty in 1625, issued forth his Letters of Request to the States of *Holland*; for Satisfaction within 18 Months, otherwise Letters of Reprizal. *Vide Journals* of that Year, and *Leo Aitzma*, p. 48. 13. 41. 82. So likewise Letters of Request went to the King of *Spain*, requiring Satisfaction for the depredation committed on the Ship and Goods of Mr. *Siampe*, who was spoiled and murdered at the *Harvanna*, Anno 1674. *Vide* the Proclamation 1675, of Reward promised by his Majesty for apprehending the Offenders dead or alive.

A Copy of
 Letters Pa-
 tents, for es-
 pecial Reprizals from the all Christian People, to whom these Presents
 King of Great shall come, GREETING: WHEREAS our
Britain, (un- loving Subject *William Courten*, Esq; deceased,
 der the Great and his Partners, Anno 1643, by the depredation and hostile act of one *Gailand*, Com-
 Seal of Eng- mander in chief of Two Ships belonging to
 land) against the East-India Company of the *Netherlands*,
 the States- was between *Goa* and *Maccas* in the Straights
 General and of *Malacca*, deprived and most injuriously
 their Subjects, spoiled of a certain Ship named the *Bona Es-*
 inrolled in the *peranza*, and of her Tackling, Apparel, and
 High Court of Furniture, and all the Goods and Lading in
 of Chancery, her, upon a very hopeful trading Voyage to
 19 Maii, 15 *China*,
 Car. 2.

Cbina, which were carried to *Batavia*, and there all *de facto* without due Process of Law confiscated. And that also in the same Year another laden Ship of Our said Subject, called the *Henry Bonadventure*, being come on ground near the Island *Mauritius*, was there both Ship and Goods seized upon by some of the Officers and Ministers, and others under the Command of the said East-India Company, and utterly detained from the right Owners. *AND WHEREAS* the said *William Courten*, and his Assigns in his Life-time, used all possible endeavours to recover the said Ships and Goods, and to procure further Justice against the Malefactors, and yet could obtain no Restitution or Satisfaction, whereby they became much to be distressed and utterly undone in their Estate and Credit: And that thereupon, and upon the most humble Supplications and Addresses of *Francis Earl of Shrewsbury*, and *William Courten*, Esq; Grand-Child and Heir of the said *Sir William*, deceased, *Sir John Ayton* and *Sir Edmond Turner*, Knights, *George Carew* and *Charles Whitaker*, Esquires, on the behalf of themselves, and divers others interested in the said two Ships *Bona Esperanza* and *Henry Bonadventure*, and in the Estates of the said *Sir William Courten*, deceased, *Sir Edward Littleton*, Baronet, and *Sir Paul Pindar*, Knight, deceased, that We would take their Case into our Princely consideration. *WE OUT OF A JUST SENSE* We then had, and still have, of their unjust *SUFFERINGS* in that business; both by Our own Letters under *OUR SIGN* Manual to the *States-General* of the *United Provinces*, and by *Sir George Downing*, Knight and Baronet, Our Envoy Extraordinary,

Extraordinary, to whom We gave especial Command so to do, required satisfaction to be made according to the Rules of Justice, and the Amity and good correspondence, which We then desired to conserve with them firm and inviolable. *AND WHEREAS* after several Addresses made to the said *States-General* by our said Envoy, and nothing granted effectual for Relief of Our said Subjects, (whom we take Ourselves in Honour and Justice, concerned to see satisfied and repaid) We lately commanded the said *Sir George Downing* to intimate and signify to the said *States*, that we expected their final Answer, concerning satisfaction to be made for the said Ships and Goods by a time then prefixed and since elapsed, that We might so govern Ourselves thereupon, that our afore-said Subjects might be relieved according to Right and Justice; and yet no satisfactory Answer hath been given, so that We cannot but apprehend it to be, not only a fruitless Endeavour, but a prostituting of Our Honour and Dignity, to make further Application after so many denials and slightings. *AND WHEREAS* *John Exton*, Doctor of Laws, Judge of our High Admiralty Court of *England*, upon our Command, to certify to Us the Value of the Losses and Damages sustained by the said *William Courten* and Partners, whose Interest is now vested in our loving Subjects, *Sir Edmond Turner*, Knight, and *George Carew*, Esq; and Partners, hath upon full Examination, and Proofs thereof made by Witnesses in Our High Court of Admiralty, reported and certified under his Hand, that the same do amount to the Sum of

of One Hundred fifty one Thousand six Hundred and twelve Pounds.

NOW KNOW YE, That for a full restitution to be made to them for their Ships, Goods and Merchandizes, of which the said *William Courten*, and the Assigns of the said *William Courten* and Partners, were so despoiled as aforesaid, with all such Costs and Charges, as they shall be at for the recovery of the same, We by the Advice of our Privy Council have thought fit, and by these Presents do grant Licence and Authority under Our Great Seal of *England*, unto our said Subjects, *Sir Edmond Turner* and *George Carew*, their Executors, Administrators and Assigns, for and on the behalf of themselves, and other Persons interested as aforesaid, to equip, victual, furnish, and to set to Sea, from time to time, such and so many Ships and Pinaces as they shall think fit. **PROVIDED** always, that there be an Entry made and recorded in the Admiralty Court, of the Names of all Ships and Vessels, and of their Burden and Ammunition, and for how long time they are victualled: And also of the Name of the Commander thereof, before the same or any of them be set forth to Sea; and with the said Ships and Pinaces by force of Arms to set upon, take and apprehend any of the Ships, Goods, Monies and Merchandizes of the *States General*, or any of the Subjects inhabiting within any their Dominions or Territories, wheresoever the same shall be found, and not in any Port or Harbour in *England* or *Ireland*, unless it be the Ships and Goods of the Parties that did the Wrong. And the said Ships and Goods, Monies and Merchandizes, being so taken and brought

E

into

Into some Port of Our Realms and Dom-
 nions, an Inventory thereof shall be taken by
 Authority of Our Court of Admiralty, by
 the Judge or Judges thereof, for the time
 being, upon Proof made before him or them,
 that the said Ships, Goods, Wares, Mer-
 chandizes or Money, did belong to the *States*
General, or any of the Subjects as aforesaid.
 That they shall be lawful Prize to the said
Sir Edmond Turner and *George Carew*, their
 Executors, Administrators and Assigns, as
 aforesaid, to retain and keep in their or any
 of their Possessions, and to make sale and dis-
 pose thereof in open Market, or howsoever
 else, to their and every of their best Advan-
 tage and Benefit, in as ample manner, as at
 any time heretofore hath been accustomed by
 way of Reprizal, and to have and enjoy the
 same as lawful Prize, and as their own proper
 Goods: SO THAT " NEITHER Captain,
 " Master, nor any of the Company, that
 " shall serve in his own person, or shall pro-
 " mote and advance the said enterprise in
 " manner and form aforesaid, shall in any
 " manner of wise be reputed or challenged
 " for any Offender against any of our Laws.
 " And that also it shall be lawful for all man-
 " ner of persons, as well our Subjects, as any
 " other, to buy the said Ships, Goods, and
 " Merchandizes so taken and apprehended
 " by the said Captains, Masters and others,
 " and adjudged as aforesaid, without any
 " Damage, Loss, Hindrance, Trouble, or
 " molestation, or incumbrance, to befall the
 " said Buyers, or any of them, in as ample
 " and lawful manner, as if the Ships, Goods,
 " Wares, and Merchandize, had been come
 " and gotten by the lawful Traffick of Mer-
 chants,

“ chants, or of just Prizes in the Time of
 “ open War.” *PROVIDED* always, that
 all Ships, Goods, and Merchandize, taken
 by virtue of this Our Commission, shall be
 kept in safety, and no part of them wasted,
 spoiled or diminished, or the Bulk thereof bro-
 ken, until Judgment have first past as afore-
 said, that they are the Ships and Merchan-
 dizes of the *States General*, or some of their
 Subjects as aforesaid. And if by colour of
 this our Commission, there shall be taken any
 Ships, Goods, or Merchandizes of any of our
 loving Subjects, or the Subjects of any Prince,
 or State in good League, or Amity with Us
 (except the *States General*) or their Subjects
 as aforesaid, and the Goods therein laden,
 sold and embezzled, or diminished, or the
 Bulk thereof broken in any place before they
 shall be adjudged to belong to the *States Ge-
 neral*, or some of their Subjects as aforesaid,
 that then this Commission shall be of no suf-
 ficient Authority to take the said Ships,
 Goods, and Merchandizes, or to warrant,
 or save harmless such as shall receive, buy,
 or intermeddle therein; but that both the
 prizes so taken, and the said Ship of War,
 shall be confiscated to our Use. “ *AND*
 “ *FURTHER*, We do hereby declare, that
 “ it is our Will and Pleasure, that this Our
 “ Commission shall remain in full force and
 “ power, to all intents and purposes, until
 “ the said *Sir Edmond Turner* and *George Ca-
 raw*, their Executors, Administrators, and
 “ Assigns, as aforesaid, shall by virtue thereof
 “ have by force of Arms apprehended,
 “ taken, seized, recovered, and received from
 “ the said *States General*, or their Subjects,
 “ one hundred fifty one thousand six hundred

“ and twelve Pounds, according to the Ap-
 “ praisement to be made by sufficient Apprai-
 “ sers, upon Oath nominated and authorized
 “ in Our said Court of Admiralty, of all such
 “ Ships, Goods, Wares, and Merchandizes,
 “ as shall be taken from the said *States Gene-*
 “ *ral*, or any of their Subjects, by virtue of
 “ this Commission, or shall otherways receive
 “ satisfaction of the Debt aforesaid, by Com-
 “ position to be made between those of the
 “ East-India Company of the *Netherlands*,
 “ and the said *Sir Edmond Turner* and *George*
 “ *Carew*, their Executors, Administrators
 “ and Assigns as aforesaid. *NOTWITH-*
 “ *STANDING* it so happen, the present
 “ Difference between Us and the *States Ge-*
 “ *neral*, depending upon general Reprisals,
 “ may be agreed and composed, and that in
 “ the Interim a Peace and good Correspon-
 “ dence may be renewed between Us and
 “ the *States-General*: *In which Case never-*
 “ *theless*, It is Our Will and Pleasure that in
 “ the Execution of this Our Commission, no
 “ Violence shall be done to the Persons of
 “ the said Subjects of the said *States-General*,
 “ but only in Case of Resistance, and that
 “ after in cold Blood, the Subjects of the said
 “ *States-General*, if hurt or wounded, shall
 “ be used with all convenient office of huma-
 “ nity and kindness. *AND FURTHER*,
 “ Our Will and Pleasure is, That although
 “ it shall happen that all hostility between
 “ Us and the *States-General*, and Our respec-
 “ tive Subjects shall cease, yet this Our Com-
 “ mission shall remain, and be in full Force
 “ and Power, to the said *Sir Edmond Turner*
 “ and *George Carew*, their Executors, Ad-
 “ ministrators and Assigns, as aforesaid, by
 “ virtue

“ virtue thereof to apprehend, take and
“ seize, by Force and Arms, so many more
“ of the said Ships and Goods of the *States-*
“ *General*, or any of their said Subjects, as
“ besides the said Sum before-mentioned,
“ shall countervail, satisfy, and pay all such
“ Costs and Charges as the said *Sir Edmond*
“ *Turner*, and *George Carew*, their Executors,
“ Administrators, or Assigns, as aforesaid,
“ shall from time to time make proof to have
“ disbursed, and paid towards the equipping,
“ manning, paying, furnishing, and victual-
“ ling of the said Ships, so licensed and au-
“ thorized as aforesaid, by this our said Com-
“ mission, to be equipped, manned, furnish-
“ ed, and victualled, by the said *Sir Edmond*
“ *Turner* and *George Carew*, their Executors,
“ Administrators, and Assigns, as aforesaid,
“ for the Purpose aforesaid.” *AND OUR*
WILL and Pleasure is, and we do hereby
require Our Judge or Judges of Our High
Court of Admiralty, for the Time being, and
all other Officers of the Admiralty, and all
other our Judge or Judges, Officers, Minis-
ters, and Subjects whatsoever, to be aiding
and assisting to the said *Sir Edmond Turner*
and *George Carew*, their Executors, Admi-
nistrators, and Assigns as aforesaid, in all
Points in the due Execution of this Our Royal
Commission, and to proceed to Adjudications,
and adjudge all Ships, Merchandizes, Monies,
and Goods, by Virtue thereof to be taken,
according to our Princely Intention, hereby
signified and expressed, and to take Care that
this Our Royal Commission to be duly execu-
ted, and favourably interpreted and construed
in all respects, to the Benefit and best Ad-
vantage of the said *Sir Edmond Turner* and

George Carew, their Executors, Administrators, and Assigns, as aforesaid. *IN WITNESS* whereof, We have caused these Our Letters to be made Patents. Witness Ourself at *Westminster*, the 19th Day of *May*, in the Seventeenth Year of Our Reign.

BY THE KING.

• XVI. It is not the place of any Man's *Nativity*, but his *Domicil*; not of his *Origination* but of his *Habitation*, that subjects him to *Reprize*: The Law doth not consider so much where he was born, as where he lives; not so much where he came into the World, as where he improves the World.

If therefore Letters of Reprizal should be awarded against the Subjects of the *Duke of Florence*, and a Native of *Florence*, (but denized or naturalized in *England*) should have a Ship in a Voyage for *Legborn*, if a Caption should be made, the same is not lawful, nor can the same be made Prize. Yet by the Laws of *England*, a natural born Subject cannot divest himself of his Allegiance; tho' he happens to be commorant in the Enemy's Country.

XVII. It doth not any where appear, that *Reprizals* can be granted on Misfortunes happening to Persons or their Goods, residing or being in Foreign parts in time of War there; for if any Misfortune happens, or is occasioned to their Effects, or to their Persons, then they must be contented to sit down under the Loss; it being their own fault, they would not fly or relinquish the place, when they foresaw the Country was subject to the spoil of the Soldiers, and devastation of the Conqueror.

The

The Factions of the *Guelfs* and *Gibellins* in Florence, warring against each other. The *Guelfs* obtaining the Victory, and thrusting the *Gibellins* out of it, after they had taken the City, *Domum cujusdam Hugonis de Papi in* Mich. 5. E. 1. *boc Regno Angliæ demorantis diruerunt,* and Rot. 53. (in *plundered his Goods therein, qui Hugo sup-* Thesaur. Re- *plicavit Domino Regi, ut Inde Itali Mercatores* cept. Regis in *(of that Faction and City then in England)* Scac.) coram *emendas hic sibi facerent;* upon which adjud- Rege Florentia *catum fuit, quod dicti Mercatores dicta Hugoni* *satisfaciant pro damnis susceptis, & destructione* *domus sue:* upon which a Writ of Error was *Vide Rot. Vaf-* brought, and the Judgment was reversed in *conia, 28 E. 3.* these words; *Quod non est consuetudo Angliæ* Rot. 7. pro Rob. *de aliqua transgressione facta in aliena Regione,* Draper & *tempore Guerra, vel alio modo — considera-* aliis Civibus *tum est, quod totus processus & ejus effectus re-* Corke in Hi- *vocentur, &c.* bernia.

XVIII. By right (for so it is now called, *Rex facit re-* of rendring like for like) there are many per- *Regium Nun-* sons exempted, and those whose Persons are *tium Populi* so privileged, have also protection for their *Romani Qui-* Goods, some by the *Laws of Nations*, some *rit. vasa comi-* by the *Civil Law*, others by the *Common Law*; The Amba- *tesque meos.* sadors of the among which *Ambassadors* by the *Laws of* *Romani* being *Nations*, their Retinue and Goods are exempt, *ill* used by the coming from him who awarded the Reprize, *Carthagini-* the *Laws of Nations* not only provided for *ans, and Sci-* the Dignity of him that sends, but likewise *pio's Army* the secure going and coming of him that is *having sur-* sent. *prized the* *Ambassadors*

Nor against those that travel for Religion, of the *Car-* nor on Students, Scholars, or their Books; *thaginians,* nor on Women or Children by the *Civil Law*: *was demand-* ed what nor those that travel through a Country, stay- should be ing but a little while there; for they are only done to them, subject to the Law of the place. answered, not as the

*Carthaginians
have done to
the Romans.*

By the *Canon Law* Ecclesiastical Persons are expressly exempt from Reprizals.

A Merchant of another place than that against which *Reprizals* are granted, albeit the Factor of such Goods were of that place, is not subject to Reprizals.

XIX. Ships driven into Port by storm or stress of weather, have an exemption from the Law of Reprizals, according to the *Jus Commune*, but by the Law of *England* otherwise, unless expressly provided for in the Writ, or Commission.

But if such Ship flies from his own Country to avoid Confiscation, or some other Fault, and is driven in by stress of Weather, she may then become subject to be prize.

But it is not lawful to make seizure in any Ports, but in his who awarded the Reprizal, or his against whom the same issued; for the Ports of other Princes or States the *Peace of them* are to be maintained.

*Vita autem
subditorum in-
nocentium, ut ex
tali causa obli-
gatur, fortè
creditum fuit
apud aliquos
populos, eo ni-
mirum quid
crederent uni-
cuique homi-
num jus vitæ*

XX. Ships attacked by those that have Letters of Reprize, and refused to be yielded up, may be assaulted and entred; and though it may fall out, not by intention, but by accident, that some of those that so resist, may happen to be slain, yet the Fault will lie at their own Doors, for hindring the Execution of right, and that which the Law most justly approves of.

*plenum esse in se, & ad rem publicam potuisse transferri, quod minime
esse probabile, nec sanctiori Theologiæ consentaneum. Grotius de Jure
belli, lib. 3. c. 2. §. 4. And seems to be of opinion by the Law of
Charity, that the Prosecution of right for a Man's Goods, which
inevitably must be by the Life of Man, ought to be omitted. Lib.
2. cap. 10. Liv. lib. 2.*

XXI. This right of changing of *Dominion* is so odious, that in the taking of Goods; if by any possibility the right Owners may have
Restitution,

Restitution, the same hath been done; and though a larger time than 24 Hours may happen between the capture and recapture, and so may *pernoctare* with the Captor; yet Restitution may be made.

If a Ship be Prize or not, this shall be tried in the Admiralty, and no Prohibition shall be granted. The Case was, there being War between us and *Denmark*, a Privateer of *Scotland* took a Ship as Prize being a *Danish* Ship, and she was condemned as Prize by the Admiralty in *Scotland*; and brought her upon the Land, and S. libelled in the Admiralty of *England*; and suggested that she was not a *Danish* but a Ship of *London*, *per Curiam*, in as much that the matter is Prize or not Prize no Prohibition. *Tompson and Smith*, 1 Sid. 320. 2 *Keeble* 158. & 176.

Prize or not Prize is of Admiral Jurisdiction. *Brown and Burton, v. Franklyn, Carth. 474.*

One who had Letters of Marque in the late Wars with the *Dutch*, took an *Ostender* for a *Dutch* Ship, and brought her into an Haven, and libelled against her as Prize, and the *Ostender* libelled in the Admiralty against the Captor for damage sustained, for the hurt the Ship sustained in the Port, and a Prohibition was prayed, for this that the Suit is for damage done in the Port, for which an Action lies at the Common Law; but the Prohibition was denied, because the Original being a Caption at Sea, and the bringing her into Port in order to have her condemned as Prize, is but a consequent of it, not only the Original, but also the consequences shall be tried there. *Turner and Cary cont. Neeles* 1.

A Ship taken at Sea as Prize shall be tried in the Admiralty.

Raymond 473, Hughs against Cornelius & al.

Thermolin v. Sands, Carth. 423. Comb. 462.

1 *Lev.* 243. 1 *Sid.* 367. 2 *Keble* 360. 364. 1 *Vent.* 173. *Radly and Delbow con. Eglesfield and Whital* 2. *Keble* 828. and 2 *Lev.* 25. *Bartbol. in* 2 *Saun.* 259. *Cr. Car.* 97. *Skin.* 59. 2 *Show.* 232.

Bartbol. in Leg. si quid

And

*Bello D. de cap.
Ang. & Salic.
in Leg. ab
hostibus, C. de
Capt. Const.
Gall. 20. tit.
13. Art. 24.
Consul Maris
287.*

And therefore if he, who hath Letters of *Marque* or *Reprizal*, takes the Ships and Goods of that Nation, against whom the same are awarded, and brings the same into a *Neuter-Nation*, the Owners may there seize her, or there the *Admiral* may make Restitution by Law, as well of the Ship's Goods to the Owners, as the Persons captives to their former Liberty; for that the same ought first to have been brought *infra Præsidia* of that Prince or State, by whose Subjects the same was taken.

*March 110.
2 Keble 441.
Morris v. Ber-
clej Res qua
infra Præsidia
perducta non-
dum sunt,
quanquam ab
hostibus occu-
pata, Domi-
num non muta-
runt, ex Gen-
tium jure.*

And with this agrees the *Common Law*; for a *Dunkirker* having taken a *French Vessel*, sold the same, at *Weymouth*, whither it had been driven before it was brought *infra Præsidia Dom. Regis Hisp.* it was in such case ruled, that if a Ship be taken by Piracy, or Letters of *Marque* and *Reprizal*, and is not brought *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the same could not become lawful Prize, nor were the Owners by such a Caption divested of their Property.

But if the Caption be by Ships of War, the Property will be immediately in the Captors, and never divested, unless afterwards *vi, manu & forti* it be in Battle regained.

*Vide 6 A. c. 13.
§. 6, 7, 8.*

XXII. Upon the sharing the *Spoil* of the captivated Ships, regard is had to the Ships present, not the Captors only; (for his Reward must be the Encouragement of his Prince, like the *Roman Corona's*, of which there were various, according to the Atchievement of the Conqueror,) for the Profits of Prizes are to be equally divided amongst the Ships present, and not solely to the Captor; therefore if Letters of *Reprizal* are granted to

two

two Ships, and they happen both of them at Sea to meet a Prize, and the one attacks and enters her, by means of which she becomes *absolutely* the Conqueror; yet the other hath right to an equal distribution with the Captor both in Ship and Goods, although he did nothing in the Conquest: the reason is, *That although he missed the opportunity of taking of her, yet the presence of his Vessel armed and prepared for Battle, at the time of taking, became a Terror to the Ship that was so conquered.* And by the Law presumed *fine ejus*, that the other Ship would not or could not be so taken, which Law hath passed the current, and approbation of the *Common Law*, as reasonable, just, and equitable, and may be pretended or surmised to entitle the Party Captor to the making Restitution of a Moiety to his Companion then present.

Mich. 32 Eliz. Somers and Sir Rich. Bulkeley's C. Howard 2. part 182.

XXIII. But if it should happen, that those to whom Letters of *Marque* are granted, should instead of taking the Ships and Goods of that Nation against whom the same were awarded, wilfully take or spoil the Goods of another Nation in amity, this would amount to a downright *Piracy*. And the Persons offenders would for such fault create a Forfeiture of their Vessel, and the Owners must be for ever concluded by the same, notwithstanding such *Commission*.

Rolls. Abridg. fol. 530. Moor 776.

XXIV. But that must be understood where such a Caption is done in a Pyratrical manner; for most certainly, if Letters of Reprizal are granted to a Man, and then he devolves the power to another, and the Party to whom the power is consigned, takes the Ship and Goods of another Nation than against whom the same were awarded, but upon

Stat. 4H. 5.c.

7. 14 H. 4.

c. 4.

upon a violent presumption that he made a right Caption, for that he found the Colours of several Nations in the Ship, the Mariners of several Countries, the Ship of the Built of that Country against whom the Letters of Reprizal were awarded, though perhaps upon a Judicial hearing the Parties are restored to their Ship and Goods, yet the Captors are not to be punished *Criminaliter*, nor the Grantee of the Letters Patents *Civiliter*: And the reason wherefore it was no injury in the Captors to take, did arise from the probable cause which will excuse the Captors from punishment (though perhaps it will not from answering of the damage;) but it is clear the Grantees are excused from both, unless privy to the Caption; and the reason is this, for the Letters Patents do not only vest the debt in the Party, but do likewise give Power to the Party to recover, and is a judicial process to obtain satisfaction, *vi, manu & forti* from the Subjects of that Prince or State against whom the same are awarded: So then it will be no more than if the Creditor deliver process to the Officer to take his Debtor, and he takes a wrong Person without the Knowledge of the Creditor, this may subject the Officer to answer Damage to the Party taken, but not the Creditor.

XXV. Therefore Letters of *Marque* or *Reprizal* issue not without good and sufficient Caution first given for the due observance thereof according to Law; the Transgression of which creates a Forfeiture of the same.

And therefore having taken a Prize, and brought the same *infra Presidia*, the Captor must exhibit all the Ship-papers, and captivated Mariners to be examined, in order to adjudication,

adjudication, till when Bulk ought not to be broken without *Commission*, nor may the Captain of the Captor suffer an embezzlement of the lading, or sell, barter or dispose of any part without *Commission*; for the King hath a proportion in all Prizes. 3 *Elix. cap. 5.*

Such Goods so brought in are not subject to pay Customs. 12 *Car. II.*
called the Act
of Naviga-
tion.

XXVI. By the Law of *Nations*, *ipso facto*, the Dominion of the things taken by those to whom Letters of *Marque* are granted, become the Captors, till the Debt and Costs, that is, the original Damage and subsequent charges are satisfied; which being done, the residue ought to be restored: So the *Venetians* used their equity, having taken the Ships of *Genoa*, did not spoil any of the lading, but preserved the same very carefully, till the Debt was paid; which done, restitution was made of the things entirely, without diminution. Greg. lib. 9.

XXVII. When for the fault perhaps of a few, a debt becomes *National*, by reason of which the Goods of the innocent become liable (if taken for satisfaction) whether by the Law of *England*, the party ought to have Contribution, is a question most certain by the *Common Law*; where more are bound to one thing, and yet one is put to the whole Burden, the Party may have process called *Contributione facienda* for his Relief: but when a debt becomes Universal or National, it seems otherwise: *For if one lends my Country Money, I will not call myself debtor, yet I will pay my share* *: So it may seem equitable by the Laws of Charity, though not compellable by the Laws of the Land. Fitz. N. B.
fol. 162. Ol.
N. Brs. 103.
Reg. Orig. fol.
176.
* *Seneca Benef.*
cap. 19.

XXVIII. Yet when depredations have happened to Foreign Merchants, and complaint hath

hath been made, the Kings of *England* have often issued forth Commissions to enquire of the same: and so it was done upon the Petition of some Merchants of *Genoa*, who complained against the Inhabitants of the Isle of *Guernsey* for a depredation, in taking away and detaining their Merchandize and Goods, to the value of many thousands of Pounds, out of a Ship wrecked by tempest near that Isle, by which the Commissioners were empowered to punish the offenders, and to make restitution and satisfaction for the damages.

The like complaint was made by the Merchants of the Duke of *Brittain*, of certain depredations committed by the Subjects of the King of *England*, who issued forth the like Commission, and to give them reparation and damages for the same; so that if the Subjects of the King of *England* have had their Goods taken by way of Reprize for the satisfaction of such debt or damage, they may have the Benefit of the like Commissions to lick themselves whole out of the Estates of the Offenders.

Pat. de An. 6.
HR 5. pars 1.
M. 9. Dorso.
De Cateris
personis arrest.
& capiend.

CHAPTER. III.

Of Privateers or Capers.

- I. Of Privateers, whether allowable by the Laws of Nature.
- II. Of permission of such by the Laws of Nations.
- III. The Occasion of their first Institution.
- IV. Whether it be lawful to undertake such an Employment.
- V. Of Commissions general to endamage an Enemy.
- VI. Of Commissions special and to Privateers, and the Immunities they claim by the same.
- VII. They are not to violate the Law of Nations. A great Case on that Head.
- VIII. Of the Care that is obliging on the issuing forth such Commissions, in reference to their Regulation, and especially in the last Treaty Marine, between England and Holland.
- IX. Of Goods subject to Prize, how considered in reference to adjudication general.
- X. Of the Goods considered in reference to adjudication, on Occasions special.
- XI. Of the Lading made Prize, whether it draws in a Forfeiture of the Vessel, and where otherwise.
- XII. Whether Ships refusing to yield up to such, life is engaged.
- XIII. Privateers where subject to Punishment, and their Actions where Occasion a Forfeiture of their Vessel.
- XIV. Of Things not subject to spoil.
- XV. Considerations general on Privateers.

I. **N**aturally every one may vindicate his own Right, therefore were our Hands given us; but to profit another in what we can, is not only lawful, but commendable, since nothing is more serviceable to Man than Man. Now there are divers obligations between Men, which engage them to mutual Aid, for Kinsmen assemble and bring

*Leg. servus. D.
de Serv. export.
DD. ad Leg. si
quis in servitu-
tem D. de ser.
Leg. prohibere.
de Jure Pisci.*

*Barthol. in
Leg. ut vim.
D. de Just. &
Jure, n. 7. & 8.*

bring help, and Neighbours are called upon, and fellow *Citizens*; for it behoves every one either to take Arms for himself, if he hath received Injury, or for his Kindred, or for his Benefactors, or to help his Fellows if they be wronged. And *Solon* taught, *That Commonwealths would be happy wherein every one would think another's injuries to be his own.* But when War is denounced, it matters not what obligations are wanting, it is enough the Nation is *injured in general*; for in that every individual is wronged, and all participate in the Indignities and publick Damages of his Country, to revenge or prevent which, is the Duty of every Member of the same.

Cicero Offic. 3.

II. Since therefore it is not against the *Law of Nature*, to spoil him whom it is lawful to kill, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be spoiled, when it suffered their Persons to be slain.

The Son of *Cato Censorinus* having served as a private Soldier of pay under *Pompeilius*, the Legion being disbanded, the young man was resolved to remain with the Army, tho' but a Volunteer; *Cato*

III. The approbation of which in the Wars of later Ages, hath given occasion to Princes to issue forth Commissions to endamage the Enemy in their Commerce, and to prevent such Supplies as might strengthen or lengthen out War, to persons to whom the prize or caption become absolutely the Captors, and that to prevent the spare of Ships of Force to be absent from their respective Squadrons or Fleets.

By those of *Holland* they were termed *Capers*, by the *Spaniard* they had their denomination from their respective parts, as *Offenders*, *Dunkirkers*, and the like, in *England* called *Privateers*; how far the Actions of those, as in relation to the attacking and killing of the Enemy, or spoiling of their Ships

Ships and Goods are lawful, not being com-
manded nor hired thereto, may be a question. wrote to Pom-
pilius the Ge-
neral, that he
should give him an Oath the second time, giving this Reason, *Quia*
priore amisso, jure cum hostibus pugnare non poterat: Cicero sets down
the very Words of Cato to his Son, whereby he admonisheth him
not to enter into Battle; *Neque enim jus esse qui miles non sit pugnare*
cum hoste. Cic. Offic. 1.

IV. By the Laws of Nations (as hath been
said) it is lawful for every Subject of that
Nation in War, to seize upon the Enemy's
Goods and Ships, as also to kill them; for
they are, after War denounced by Law,
looked upon as of no account; and if respect
be had to natural and internal Right, it
seems granted to every one in a just War to
do those Things, which he is confident within
the just measure of warring, to be advanta-
geous to the innocent party: but though
there may be such authority given, yet what
title can they claim or appropriate to them-
selves of the Ships or Goods of Enemies, (for
surely there is nothing owing to such, nor
are they lawfully called to the same) unless
they can shrowd themselves under the Pro-
tection of this, that what they do, is only to
exact punishment from the Enemy by the
common right of men.

V. Commissions to kill or spoil the Enemy
are in two respects, either general or special:
General as in a tumult; among the Romans
the Consul said, *Whosoever would have the*
Commonwealth safe, let him follow me; and to
all particular subjects is sometimes granted a
Right of killing in self-defence, when it is
publicly expedient, as on a sudden occasion,
and the like.

VI. Special Commissions are such as are Leg. Deserto-
granted to those that take Pay, and are under rem. D dars
Orders; the not obeying of which may be milit.
F punished

C. Quando
liceat unicui-
que Leg. 1.
§ 2.

punished with Death, though the act succeeds well.

Others to repair a particular damage by way of *Reprize*, the original damage being turned into a National debt, but that satisfied, the other determines: or else to those who receive no pay, but go to War at their own charge; and that which is more, administer at their own costs a part of a War, by providing Ships of Force, and all other military provisions to endamage the Enemy or their Confederates, the which are termed *Privateers*, &c. as above, to whom instead of pay is granted leave to keep what they can take from the Enemy; and though such Licence is granted them, yet may they not convert of their own Heads to their private use those Prizes, before the same have been by Law adjudged lawful to the Captors.

VII. Nor may such *Privateers* attempt any thing against the Laws of Nations, as to assault or endamage an Enemy in the Port or Haven, under the protection of any Prince or Republick, be he Friend, Ally, or Neuter, for the peace of such places must be kept inviolably.

Sir *Kenelm Digby* having obtained a Commission against the *French*, being in the *Straits*, was every where honoured as a *Cavalier* whom the King of *Great-Britain* favoured; in his Voyage he took some Prizes, and coming to *Algier* redeemed several Captives, whom he took aboard, and placed in the several Vessels he had made prize of: the which he so effected, that in a short time he became *Illustrious* of six Ships of War; coming to *Cape Congare*, ten leagues from *Sanderoon*, and having sent a Boat to desery the

the road, word being brought that there were in the road two *Venetian* Galeasses, with two other Galeons, two *English* Ships, and several *French* Ships; Sir *Kenelm* being satisfied of the Prize, resolved to attack them the next morning, although the Admiral of the *Venetians* had declared himself Protector of the *French*, and that he would destroy all the *English* Ships of War that he should meet, either in that *Republick's* or *Grand Signior's* Seas. Sir *Kenelm* notwithstanding resolved to engage them, and accordingly bore up to them, and the *Venetian* General weighed Anchor to meet him; Sir *Kenelm* before he fired, sent a *Letter* to inform the *Venetian* of his Quality, and of his Commission, being only to endeavour to make prize of the *French*, and giving him all the assurance possible of his friendship, and respect to the *Republick*; but before the *Letter* was answered, the engagement was begun by the *English*, *French*, and *Venetian*. This Action of Sir *Kenelm Digby* was questioned by the *Turk*, for that Hostility had been committed by the *English*, in the *Grand Signior's* Road, and thereupon the *Bassa* of *Alep* and *Cady* of *Scanderoon* made an *Agonie* or Embargo on the *English* Merchants, till reparation was made, for the breaking the Peace of the Port.

VIII. In the granting of such private Commissions there is always great care to be had and taken by caution, to preserve the League of our Allies, Neuters and Enemies, according to their various and several Treaties, and therefore at this day by the late Treaty between his Majesty and the States of *Holland* at *London*, before any Privateer or Caper can receive Commission, the Commander is ob-

Treaty Marine
at Lond. De-
cem. 1, 1674.
In the Com-
mission must
always be
mentioned
that they
have given
such security.

There is a Provision to the like Effect between us and the French on the last Peace.

IX. If a Suit be commenced between the *Captor* of a Prize and the *Claimer*, and there is a Sentence or a *Decree* given for the party reclaiming; such Sentence or Decree (upon security given) shall be put in execution, notwithstanding the Appeal made by him that took the Prize, which shall not be observed in case the Sentence shall be given against the Claimers; if torture, cruelty, or barbarous use happens after a Caption, to be done to the Persons taken in the Prize, the same shall *ipso facto* discharge such a Prize, although the was lawful, and the Captains shall lose their Commissions; and both they and the Offenders be subjected to punishment.

In hostium esse
partibus, qui
ad bellum ne-
cessaria hosti
administat.

X. Such sorts of Instruments having made a caption of Ships bound for an Enemy from Nations Neuter, or in amity with both the warring States; the lading, in order to be made Prize is reduced to these three several heads.

First,

First, those Goods that are fit to be used in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other instruments and provisions of Armature fit to be used in the Field or at Sea.

The second are those things that may be used in time of War, and out of War, as Money, Corn, Victuals, Ships, and the like.

And the last; are those Goods that are only fit for luxury and pleasure.

XI. The first are accounted Prize without controversy; *He is to be accounted an Enemy that supplies an Enemy with things necessary for the War.*

The second is to be governed according to the state and condition of the war; for if a Prince cannot well defend himself, or endamage the Enemy, without intercepting of such things, necessity will then give a right to the condemnation. And so Queen Elizabeth did the *Hansiatick* Fleet taken, laden with Corn for *Lisbon*, upon consideration of the state of the War, the same became prize.

not upon any account be called prohibited, nor subject to a condemnation, except carried to places besieged, *Art. 4.* See *John Meursius* his *Danish* History concerning the prohibiting of Goods by those Northern States. *Vide postea*, the Grand Prize condemned by *Q. Elizabeth* in tit. Customs, and *vide tit.* Ships of War, §. 24.

The last become free, and (as we have before-mentioned) according to that of *Seneca*; *I will not help him to Money to pay his Guards; but if he shall desire Marbles and Robes, such things hurt not others, only they minister to his luxury: Soldiers and Arms I will not supply him with; if he shall seek for Players and recreations to soften his fierceness, I will gladly offer to him: Ships of War I would not send him,*

Consultat. Maris editus est lingua Italica, in quem relata sunt constitutiones Imperatorum Græciæ, &c. cujus libri tit. 276.

Cambden Ann. 1591. By the fourth Article of the Treaty at Lond. 1674. those Goods that may be used out of War as in War (except Ships) may.

but such as are for pleasure and ostentation of Princes sporting in the Sea, I will not deny.

And Persons
so attempting
to relieve an
Enemy may

in some cases be punished; but if the same be done by necessity of obedience, though the parties are much to be blamed, they yet are not to be punished; and so it was with those which relieved Sir John Oldcastle with provisions, who being taken, were discharged.

But if part be prohibited Goods, and the other part is not prohibited, but such as according to the necessity of the War shall be so deemed, the same may draw a consequential condemnation of Ships, as well as lading.

By the seventh
Article in the
Treaty at Lon-
don, if the
Skipper will
deliver out
the prohibi-

ted Goods, the Ship may proceed with the rest in their Voyage or Course, as they please, and the Ship shall not be brought into Port.

*Nec reus est
mortis aliena,
inquit Augus-*
*tinus, qui suae
possessioni mu-*
rorum ambi-
tum circumduxit: si aliquis ex ipsorum usu percussus intereat. Publ.
Epist. 154.

XIII. If such Ships shall be attacked in order to an examination, and shall refuse, they may be assaulted, as a house supposed to have Thieves or Pirates in it, which refuses to yield up their persons, may be broken up by the Officer, and the Persons resisters may be slain.

Leg. 5. de Na-
vial. C. lib. 3.
Trin. 3. Jac.
in B. R.
Rolls Abridg.
f. 530.

XIV. But if any of these Privateers wilfully commit any spoil, depredations, or any other injuries, either on the Ships of our Friends or Neuters, or on the Ships or Goods of our own Subjects, they will, notwithstanding they are not in pay, be subjected in some cases to Death and other punishments, according to the demerits of their crimes, and perhaps may subject their vessel to Forfeiture.

And

And though by the Law of Nature the Goods of Enemies are to be spoiled as well as their Persons slain, yet some Goods and things seem exempted, and ought not to be spoiled, and therefore it is not lawful to land on the Territories of our Enemies, to spoil places dedicated to God: Though *Pomponius* observes, when places are taken by the Enemy, all things cease to be Sacred; the reason given is, because the things which are called Sacred, yet are they not indeed exempted from humane uses, but are publick. *The Townsmen*, saith *Tacitus*, opening their gates, submitted themselves and all they had to the Romans, ¹³ themselves were spared, the Town was fired. *Pompey* entred the Temple by the right of Victory, not as a suppliant, but as a Conqueror: and though that privilege may seem right by the Law of War to a Sovereign, or a General, that intends a conquest, yet that power may not seem devolved to him, whose Commission is cautionally to endamage the Enemy only, as in reference to his commerce and provisions of enabling them to withstand the War: Certainly that conquest is poor, whose Trophies and Triumphs are made up with Roofs, Pillars, Posts, Pulpits, and Pews, and the spoil of Agriculture. Hence it is, that at this day the king of *France* in *Germany* and the *Netherlands* accepts of Contributions, by which the Cities and Churches are not only spared, but even the Countrymen plough and sow as quietly as if there were no Armies in their Territories at all.

F 4

XV. Most

the same ruin, the Citizens and Priests equally slaughtered; nor is the rapine of sacred riches and prophane unlike: so many are the Sacrileges of the *Romans* as their Trophies, so many are their Triumphs over Gods and Nations; and then goes further, *Tot manubie quot manant adhuc simulachra captivorum decorum. Mox & bene, Quod si quid ad veris*

Pompon. Leg. cum loca D. de Religiosis.

Tacit. Annal. 13.

Wars and Victories for the most part consist in taking and overthrowing Cities, which work is not done without injury of the Goods, the walls of Cities and Temples of the Gods, partake in

adversis Urbibus accidit, eadem clades Templorum quæ & manium fuerant.

Even upon the same Reason, that the Instruments of Husbandmen are not to be taken for a pledge by the Civil or Common Law. *Leg. exeunt. C. quæ res pign.* Coke on Littleton 47.

XV. Most certain, those sorts of Capers or Privateers, being Instruments found out but of later Ages, and 'tis well known by whom, it were well they were restrained by consent of all Princes; since all good Men account them but one remove from Pirates, who without any respect to the cause, or having any injury done them, or so much as hired for the Service, spoil Men and Goods, making even a Trade and Calling of it, amidst the calamities of a War, and driving a commerce and mart with the spoil, and that with as much peace and content, as if they had never heard of Tears, Blood, Wounds, or Death, or any such things: such to expose their lives against Ships of the like kind, were both honourable and just, or those that should aid the Enemy with Goods prohibited as afore, such Prizes were possessions most noble; but the Goods, Ships and Lives of the innocent peaceable Traders to be exposed to rapine and spoil, renders them worse than the *Roman* Lictors, by how much 'tis to kill without cause, Headsmen executing the guilty, they the guiltless.

It was a high necessity that enforced the *English* to commissionate such, the number of her then Enemies covering the Sea, like the *Egyptian* Locusts; it were well they were rejected by consent, or if allowed of, not subject to Quarter, when taken by Ships of War: A Trade that *St. Paul* never heard of, when
 1 Cor. ix. 7. he said, *Who goeth to War at his own charge?*

C H A P. IV.

Of Piracy.

- I. *Pirates what.*
- II. *Of the duty incumbent on Princes and States as in reference to such, and whether liable for the damages they commit.*
- III. *Pirates where they hold a Society, how the same is esteemed in law, and of equality held by them.*
- IV. *Whether capable of the Solemnities of War, and Right of Legation.*
- V. *Whether capable of succour by the Laws of Nations.*
- VI. *Ships were liable for redemption of the Master remaining pledge for Ship and Lading, and where not.*
- VII. *Oath given to pay a reward for redemption of a Ship from Pirates, whether the same ought to be performed.*
- VIII. *Foreigners spoiled by English Pirates, may pursue for Justice within the Statute of 28 H. 8.*
- IX. *So where the Subjects of any Foreign Nation committing the same, may be punished by the same Statute.*
- X. *Piracy committed by the Subjects of a Nation in Enmity with the Crown of England among English Pirates, cannot be punished by the Statute of 28 H. 8.*
- XI. *Committed on the British Seas punishable by the Crown of England, and none other.*
- XII. *Where committed in the Ocean, whether they may be executed with trial, by the Law of Nature.*
- XIII. *The like where the Judge refuses to try them, or in case of emergency, whether Justice may be executed immediately.*
- XIV. *Pirates attempting to rob, commit a Murder, whether all principals, or only the slayer, and the rest accessories.*
- XV. *If the subjects of one Foreign Nation rob another, and bring the Booty into England, whether*
the

the party injured may proceed Criminaliter for punishment, and Civiliter for restitution.

XVI. Pirates take Men, and no part of the Lading, if Piracy.

XVII. Where a Master may commit Piracy of those things that are committed to his charge, and where not.

XVIII. Where Piracy may be, though there be nothing taken: and where Goods are taken out of a Ship, and nobody in it.

XIX. The Captain and Crew of a vessel having a Commission of Reprize commit Piracy, whether those that employed them ought to answer the Damage.

XX. Where Goods taken at Sea amount not to Piracy.

XXI. Goods taken and retaken by a Friend, whether the Property of the Prize is altered.

XXII. Of Restitution of Goods taken by Piracy by the Laws of England.

XXIII. Of Restitution refused by the Laws of England. Justifications in this by a Warrant from the Admiralty. The Admiralty must allow the Statute of Limitation if pleaded.

XXIV. Of Piracy as in reference to matters Criminal, and how punishable at this Day by the Laws of England.

XXV. The Statute of 28 H. 8. how it operates in cases of Piracy.

XXVI. Of Pardons in cases of Piracy, Forfeitures, Corruption of Blood, and Clergy.

XXVII. Whether a Depredation committed in a Port within this Realm remains Robbery, at the Common Law, or Piracy by the Law Marine.

XXVIII. Whether Clergy is allowable for a Depredation in a Port, and if Pardons extend thereto.

XXIX. A Pirate arraigned and standing mute shall have Judgment of Pain, Fort and Dure.

XXX. Of the Operation of the Attainder in cases of Piracy.

XXXI. Of Goods taken at Sea and brought to Land, whether the Party is punishable by our Law, Stat.

Stat. 11. 12 W. 3. c. 7. *Piracy where and how triable.*

XXXII. *If the Admiralty claims either an original, or a concurrent Jurisdiction, the Courts above will not intermeddle.*

XXXIII. *Satisfaction of old, how made to Persons spoiled at Sea.*

XXXIV. *Persons unjustly detained in Custody upon Suspicion of Piracy, the Courts above, on a Habeas Corpus, may, if there be just cause, either bail or discharge them.*

I. **A** *Pirate is a Sea-Thief, or Hostis humani generis, who to enrich himself, either by surprise or open force, sets upon Merchants and others trading by sea, ever spoiling their Lading, if by any possibility he can get the mastery, sometimes bereaving them of their Lives, and sinking their Ships; the Actors where in, Tully calls Enemies to all, with whom neither Faith nor Oath is to be kept. Against Pirates and such as live by Robbery at Sea, any Prince hath power to make War, tho' they are not subject to his Government. Grot. de jure belli & pacis. lib. c. cap. 20. §. 40.*

II. *By the Laws of Nature, Princes and States are responsible for their neglect if they do not provide Ships of War, and other remedies for the restraining of those sort of Robbers; but how far they are bound, either by the Civil Law or Common Law of this Kingdom, may be some question; for it is agreed, they are not the cause of the unjust spoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State should send forth Ships of War, or Commissions for reprisal, and those instead of taking prizes from the Enemy, turn Pirates and spoil*
the

Caution is commonly taken upon the giving forth of such Commissions to prevent the same, if possible. They are generally restrained by Proclamation when a War breaks forth, and commanded that none presume to set forth without a Commission. * *Constit. Gallie tom. 3. tit. 3. Constitutio- ne Anni 1583. cap. 44. Vide etiam tom. con- stit. 3. tit. 2. constit. Anni 1543. cap. 44. Vide 21. Arti- cle at the Treaty at*

the Subjects of other Friends, there has been some doubt, whether they ought not to make satisfaction to the Parties injured, in case the offenders should prove unable. Surely there is no more reason for this latter than the first; seeing Princes and States may give all their subjects power to spoil the Enemy, nor is such a Permission any cause why damage was done to our Friends, when even *Private* Men without any such permission, might send forth *Ships of War*; besides, it is impossible that *Princes* or *States* should foresee, whether they would prove such or not; nor can it be avoided, but we must employ such, otherwise no *Army* or *Fleet* could be prepared; neither are *Kings* to be accused if their Soldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to punish and yield up the Offenders, and to see that legal Reparation be made out of the Estate of the Pirates. If *Letters of Marque* or *Reprizal* be granted out to a Merchant, and he furnishes out a Ship with a Captain and Mariners, and they instead of taking the Goods or Ships of that Nation against whom their *Commission* is awarded, take the Ships and Goods of a Friend, this is *Piracy**; and if the Ships arrive in *England*, or in any other of his Majesty's Dominions, the same shall be seized, and the Owners for ever lose their Vessel †.

Breda between *England* and *Holland*, and the 15th Article in the *Marine Treaty* at *London* 1674. : † 1 *Rolls Abr.* 530. 776.

From hence it is, that Princes and States are very cautious upon this we call *Jure Belli privati*, how they engage themselves, or those who seek reparation for wrongs before received; for the Person *injured* governs not the action,

action, but devolves the power to some other hired for that particular use, whose Law is no more than this, *There is most right where is most pay or prize.* Unhappy state of man, whose support and living is maintained only by exposing himself to Death; a Calling that nothing can make honest, but the highest necessity or pious charity. And therefore those that issue forth such sort of *Commissions*, generally take Caution for their returning within a convenient Time, and not to wander in that unhappy condition.

III. Though Pirates are called Enemies, *Leg. Hostes de* yet are they not properly so termed: For *he verbi. signific.* *is an Enemy*, says Cicero, who hath a *Commonwealth*, a Court, a Treasury, Consent and Concord of Citizens, and some way, if occasion be, of Peace and League; and therefore a Company of Pirates or Freebooters are not a *Commonwealth*, tho' perhaps they may keep a kind of equality among themselves, without which no Company is able to consist; and though it is seldom they are without fault, yet they hold society to maintain right, and they do right to others, if not in all Things according to the *Law of Nature* (which among many people is in part obliterated) at least according to agreements made with many other Nations, or according to Custom: So the Greeks, at what Time it was accounted lawful to take spoil at Sea, abstained from slaughter and depopulations, and from stealing Oxen that plowed, as the Scholiast upon *Thucydides* observes; and other Nations, living also upon the spoil when they were come home from Sea, sent unto the Owners to redeem (if they pleased at an equal rate) what they were robbed of at Sea: and at this day, if a Ship hath the

the Emperor of *Barbary's* protection, the Pirates of that Nation (if they seize) will restore, and if there be no protection, yet if taken within sight of their Castles, the Prize is not absolute; but if resistance is made, and there be a Caption, she then becomes the Captor's for ever, *as the price of Blood.*

Grpt. de Jure belli & pacis, lib. 2. c. 18. §. 2.

** Constantino-ple, generally so called.*

IV. Again, Pirates that have reduced themselves into a Government or State as those of *Algier, Sallee, Tripoli, Tunis*, and the like, some do conceive ought not to obtain the Rights or Solemnities of War as other Towns or places; for though they acknowledge the Supremacy of the * *Porte*, yet all the power of it cannot impose on them more than their own Wills voluntarily consent to. The famous *Carthage* having yielded to the victorious *Scipio*, did in some respect continue, and began to raise up her drooping Towers, till the knowing *Cato* gave Counsel for the total extirpation; out of the Ruins of which arose *Tunis*, the revenging Ghost of that famous City, who now, what open Hostility denied, by Thieving and Piracy continue; as stinking Elders spring from those places where noble Oaks have been fell'd; and in their Art are become such Masters, and to that degree, as to disturb the mightiest Nations of the Western Empire; and though the same is small in bigness, yet it is great in mischief; the consideration of which put fire in the Breast of the aged *Lewis IX.* to burn up this nest of Wasps, who having equipt out a Fleet in his way for *Palestine*, resolved to besiege it: Whereupon a Council of War being called, the question was, Whether the same should be summoned? and carried, it should not; *for it was not fit the solemn Ceremonies of War should*

Fuller's Holy War, lib. 4. cap. 27.

should be lavished away on a company of Thieves and Pirates. Notwithstanding this Tunis and Tripoli, and their Sister Algier do at this day (though nests of Pirates) obtain the right of Legation, and Sir John Lawson did conclude a Peace between his Majesty by the Name of the most Serene and Mighty Prince Charles the Second, by the Grace of God King of Great Britain, France and Ireland, Defender of the Faith, &c. and the most Excellent Signors Mahomet Bashaw, the Divan of the Noble City of Tunis; Hagge Mustapha Dei, Morat Bei, and the rest of the Soldiers in the Kingdom of Tunis; and with them of Tripoli by Sir John Narborough * by the Name of Halil Bashaw, Ibrahim Dey, Aga, Divan, and Governors of the Noble City and Kingdom of Tripoli in Barbary. So that now (though indeed Pirates) yet having acquired the Reputation of a Government, they cannot properly be esteemed Pirates but Enemies.

Osob. 5. Anno 1662. But by the Turk in these words, confirmed and sealed in the presence of Almighty God, in our House in the noble City of Tunis, the last day of the Moon Deled, and the year of Hegera 1085. * March 5, 1675-6, and (afterwards, May 1, 1676, by the Turks) being the 26th day of the Moon Zaphire, and the year of the Hegera, 1087.

V. Pirates and Robbers that make not a Society, i. e. such a Society as the Law of Nations accounts lawful, are not to have any succour by the Law of Nations, Tiberius, when Tacfarinas had sent Legates to him, he was displeased, that both a Traitor and a Pirate should use the manner of an Enemy, as Tacitus hath it; yet sometimes such men (Faith being given them) obtain the right of Legation, as the Fugitives in the Pyrenean Forest, and the Banditti at Naples; and Solyman the Magnificent, having entertained Barbarosso the famous Pirate, sent word to the Venetians, that they should use him and

Tacit. Annal. 3. Caesar, lib. 3. de Bello Civ.

Hist. Republ. Venet. fol. 91.

from him, that they should use him and

esteem him no more as a Pirate, but one of their own Port.

ff. ad Legem Rhod. de jactu. l. 2. §. si navis à Piratis redempta.

* The same Point, and also in Case of Capture by an Enemy, Lord Raymond 933.

To know whether the Proceedings in such Matter be legal, the Party must

wait till the Promovent has libelled, before he can move for a Prohibition. *Ibid.* 934.

VI. If a Ship is assaulted by a Pirate, for redemption of which the Master becomes a Slave to the Captors, by the Law Marine, the * Ship and Lading are tacitly obliged for his redemption by a general Contribution. But if a Pirate shall feign himself stranded, and to decoy the Merchant-Man for his relief, shall fire his Guns, or wave his Colours, who accordingly varies his Course for his Assistance, and the Pirate enters him, for redemption of which he becomes a Slave to the Pirate, there contribution shall not be made, because it was his folly to be so decoyed.

VII. By the *Civil Law* a Ransom promised to a Pirate, if not complied with, creates no wrong; and the reason given is, for that the Law of Arms is not communicated to such, neither are they capable of enjoying that privilege which lawful enemies may challenge in the Caption of another; however this hath its measure; for a Pirate may have a lawful possession, the which he cannot be denied (if injury or wrong be done him) to claim the benefit of Law. But the reason of that springs from a more noble Fountain, which is his taking a legal course, for by that he hath submitted to the Magistrate, and paid obedience to the Laws in demanding Justice; besides, the same is not done so much in favour of the Pirate, as in Hatred of him who first commits the wrong. *Augustus* the Emperor proclaimed a reward of ten Sesterces to be given him that should bring in *Coracotas*, the famous

Bodin. l. 1. c. 1

famous *Spanish pirate*, who having notice of the same, voluntarily comes and presents himself before the Emperor, and demands the promised reward: and the question was, whether death or the Sesterces were to be his reward: The Emperor gave Judgment, that the sum promised, should be paid him, for otherwise in taking away his life he should deceive him of the sum promised, which would, in effect, violate the publick Faith given to him, who of himself offered himself upon the trial of Justice

A Pirate attacks a Merchant-Man, and enters her, for redemption of which the Master gives his Oath, at a time and place to pay the Pirate a sum certain; by some it hath been held, that the Master commits not perjury, if the price promised for redemption be not brought according to the Oath; because a Pirate is not a determinate, but a common Enemy of all, with whom neither Faith nor Oath is to be kept: but that is no *Leg. bona fide* reason for the assailing of the Vow; for *D. Expi.* though the Person be deficient, yet the Just God is concerned; nor can that person that hath promised a thing, satisfy his Conscience after he hath once delivered it to him, to recover it back again; for the words in an Oath, as to God, are to be understood most simply, and with effect; and therefore he that returned secretly to the Enemy, and again departed, made not good his Oath concerning his Return.

VIII. If an *English Man* commit Piracy, be it upon the Subject of any Prince or Republick in amity with the Crown of *England*, he is within the purview of the *Stat. of 28 H. 8.* and so it was held where one *Winterfon, Smith,*

On a Com- mission grounded on the Stat. awarded, *Rott. Adm.* 28 *Eliz. m. 23.* and others, had robbed a Ship of one *Matu- rine Gantier*, belonging to *Bourdeaux*, and bound from thence with *French Wines* for *England*, and that the same was Felony by the Law Marine, and the parties were convicted of the same.

Rott. Adm. anno 28 *Eliz. m. 24.* IX. And so if the Subject of any other Nation or Kingdom, being in Amity with the King of *England*, commit Piracy on the Ships or Goods of the *English*, the same is Felony, and punishable by virtue of the Stat. and so it was adjudged, where one *Careless*, Cap- tain of a *French Man* of War of about 40 Tuns, and divers others, setting upon four Merchant-Men going from the Port of *Bristol* to *Caermarthen*, did rob them of about 1000*l.* for which he and the rest were arraigned and found guilty of the *Piracy*.

Normandy was lost by King *John*, and out of the lige- ance of the King of *Eng- land*, and they were as now accounted Aliens, 42. *Affise placit.* 25. per *Shard.* vid. 2 H. 5. cap. 6. But before the Stat. of 25. Ed. 3. if the subjects of a foreign Nation and some *English* had joined together, and had committed Pira- cy, it had been Treason in the *English*, and Felony in the Foreigners: And so it was said by *Shard*, where a *Norman* being Comman- der of a Ship, had together with some *English*, committed Robberies on the Sea, being taken, they were arraigned and found guilty; the *Norman* of Felony, and the *English* of Trea- son, who accordingly were drawn and hanged. But now at this day they both receive Judg- ment as Felons by the Laws Marine.

X. If the Subjects in enmity with the Crown of *England* be Sailors aboard an *English* Pirate with other *English*, and then a robbery is committed by them, and afterwards are taken, it is Felony without controversy in the *English*, but not in the *Strangers*; for they cannot be tried by virtue of the Commission upon

upon the *Statute*, for it was no Piracy in them, but the Depredation of an Enemy, for which they shall receive a Trial by Martial Law, and Judgment accordingly.

XI. Piracy committed by the Subjects of the *French King*, or of any other Prince or Republick, in amity with the Crown of *England* upon the *British Seas*, is punishable properly by the Crown of *England* only, for the Kings of the same have *istud regimen & dominium exclusive* of the Kings of *France*, and all other Princes and States whatsoever.

Selden Mare Claus. lib. 1. cap. 27. Case of Reginor Grimbald in temp. Ed. 1. Cited in 4 Inst. fol. 142. in c. of the Admiralty.

XII. If Piracy be committed on the *Ocean*, and the Pirates in the Attempt there happen to be overcome, the Captors are not obliged to bring them to any port, but may expose them immediately to punishment, by hanging them up at the Main-yard end before a Departure; for the old natural liberty remains in places where are no Judgments.

Injicere manus paræ traxerunt debitum sibi, & sermone usus est juris; nam manus in jectio dicitur, quoties nulla judicis auctoritate, rem nobis debitam vindicamus. Serv. Æn. 11.

And therefore at this Day, if a Ship shall be on a Voyage to the *West-Indies*, or on a Discovery of those parts of the unknown World, and in her Way be assaulted by a Pirate, but in the Attempt overcomes the Pirate by the Laws Marine, the Vessel is become the Captors; and they may execute such *Beasts of Prey* immediately, without any Solemnity of Condemnation. If we respect expletory Justice, it cannot be denied, but for the Conservation of Ship and Goods, a Pirate invading may be slain, for the inequality between these things and life is made up in favour of the innocent, and by hatred to the injurious: Whence it follows, if we regard only that Right, that a Pirate running away with stolen Goods, if they cannot otherwise be recovered, may be sunk. *Demosthenes* said, *It was very*

Oratiene in Aristocratem.

hard and unjust, and contrary both to the written Laws and the common Rules amongst Men, not to be suffered to use Force against him who in a hostile manner hath taken my Goods.

Leg. extat. D. quod metus.

Honorius & Theodosius; idcirco Judiciorum vigor fu-

risque publici tutela in medio constituta, ne quisquam sibi ipsi permittere valeat ultionem. Leg. nulli C. de Judæis.

Plutarch. in Cæsar.

XIII. So likewise, if a Ship shall be assaulted by Pirates, and in the Attempt the Pirates shall be overcome, if the Captors bring them to the next port, and the Judge openly rejects the Trial, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors.

Caius Cæsar being but a private Man pursued the Pirates, by whom he formerly had been taken and spoiled, and making up to them with such a Fleet as he possibly in haste could get ready, attacked, burnt, and destroyed their Ships, and the Men he brought back to an Anchor, where repairing to the *Proconsul* to do Justice, and he neglecting, himself turned back, and there hanged them up.

XIV. If a Pirate at Sea assault a Ship, but by force is prevented entering her, and in the attempt the Pirate happens to slay a person in the other Ship, they are all *Principals* in such a Murder, if the *Common Law* hath Jurisdiction of the cause: but by the Law Marine, if the parties are known, they who gave the wound only shall be *principals*, and the rest *accessories* *; and where they have cognizance of the principal, the Courts at *Common Law* will send them their accessory, if he comes before them †.

* *Ralph Williams* indicted for the murder of one *Join Terrey*;

and *Bridget, Black*, and others as Accessories.

M. 24. † Yelverton fol. 134, 135.

Rot. Admir. 28 Eliz.

XV. If

XV. If a *Spaniard* robs a *French* Man on the High Sea, both their Princes being then in amity, and they likewise with the King of *England*, and the Ship is brought into the ports of the King of *England*, the *French* Man may proceed *Criminaliter* against the *Spaniard* to punish him, and *Civiliter* to have Restitution of his Vessel: but if the Vessel is carried *infra Præsidia* * of that Prince, by whose subject the same was taken, there can be no proceeding *Civiliter*, and doubted if *Criminaliter*; but the *French* Man † must resort into the Captor's or Pirate's own Country, or where he carried the Ships, and there proceed.

Res quæ intra Præsidia perductæ nondum sunt quanquam ab hostibus occupatæ, dominum non mutantur ex Gentium jure.

Grotius de Jure belli ac Pacis. c. 9. §. 16.

* March's Reports 110.

† Leg. Hostes & Leg. Latro.

non D. de Cap. Leg. possim à Piratis eod. Tit.

A *Dutchman*, but naturalized by the Duke of *Savoy*, and living at *Villa Franca*, in his Dominions, procures a *Commission* from the States of *Holland*, and coming to *Leghorn*, there rid with the Colours and Ensigns of the Duke of *Savoy*; the Ship *Diamond* being then in Port, and having received her Lading, was afterwards in her Voyage home surprised by that Caper, and brought into *Villa Franca*, and there condemned and sold to one *Poleman*, which Ship afterwards coming for *England*, the Plaintiffs having Notice, made a seizure; and upon Trial, Adjudication passed for the Plaintiffs, the original Proprietors: For tho' the Ship of War and the Captors were of *Savoy*, and carried thither; yet being taken by virtue of a *Dutch Commission* by the *Law Marine*, she must be carried *infra Præsidia* of that Prince or State by virtue of whose *Commission* she was taken. Nor can such carrying of the Ensigns or Colours of the Duke of *Savoy*, who was then in amity with the Crown of *England*, or the Commander, though

The Caption was in 1665.

Adjudication passed May 13, 1670. upon

which there was an Ap-

peal to the Duke of York;

but nothing came of it.

Rott. Admir.

in An. supra dicta.

a subject of that Prince, make him a Pirate, or subject them or those to whom they have transferred their interest of the prize, any ways to be questioned for the same. *Criminalliter*; for that the original *quoad* the taking was lawful, * as one Enemy might take from another; but *Civiliter* the same might be, for that the Captor had not entituled himself to a firm possession †. And therefore in all cases where a Ship is taken by *Letters of Marque or Piracy* *, if the same is not carried *infra Presidia* of that Prince or State by whose Subject the same was taken, the Owners are not divested of their Property, but may re seize wheresoever they meet with their Vessels.

XVI. If a Pirate attacks a Ship, and only takes away some of the Men, in order to the selling them for slaves, this is Piracy by the Law Marine; but if a Man takes away a *Villain* or *Ward*, or any other Subject, and sells them for slaves, yet this is no robbery by the *Common Law*.
C. 2 *Inst.* 109. lib. 8. fol. 32. 6 *Galey's C.* but Black-mail, and such sorts of taking in Cumberland, Northumberland, and Westmoreland was made Felony 43 *Eliz.* cap. 13.

XVII. If a Bale or Pack of Merchandize be delivered to a Master to carry over Sea to such a Port, and he goes away with the whole Pack or Bale to another Port, and there sells and disposes of the same, * the same is no Felony, but if he opens the Bale or Pack, and take any thing out, *animo furandi*, the the same may amount to such a Larceny, as he may be indicted in the *Admiralty*, though it amounts not to a Piracy. Yet if such a Master of a Ship shall carry the Lading to the Port appointed, and after retakes the whole Pack or Bale back again, this may amount to a Piracy;

* ff. *Nautæ*
Caup. l. 1. sect.
3 *Stab.*
Glanvil. lib.
10. cap. 13.
13 *Ed.* 4. 9.
Nautæ Caup.
Stab. lib. sect.
7. sect. *recept.*
Co. 3. *Inst.*
107, 108.

a Piracy; for he being in the nature of a Common Carrier, the delivery had taken its effect, and the Privity of the Bailment is determined.

XVIII. If a Pirate shall attack a Ship, and the Master for the Redemption shall give his Oath to pay a Sum certain; though there be no taking, yet is the same Piracy by the *Law Marine*; but by the *Common Law* there must be an actual taking, though it be but to the value of a Penny, as to a Robbery on the Highway.

44 E. 3. 14.
H. 4. 2.
ad Leg.
Rbod. de jact.
l. 2. §. si
navis à Pira-
tis redempta-
fit.
14 E. 3. 115.

If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-boat, and the rest on the shore, and none shall be in the Ship; yet if a Pirate shall attack her and rob her the same is Piracy.

XIX. A Merchant procures Letters of *Trin. 7 Jac. in* Marque or *Reprise*; and then delivers the Commissions to persons to endeavour a satisfaction; if such Persons commit Piracy, the Vessel is forfeited without controversy: But the Merchant is no ways liable to make satisfaction; for though the Superior shall answer for the Actions of his Ministers or Servants, yet that is introduced by the *Civil Law*; but this question must be decided by the *Law of Nations*, by virtue of which such Commissions are awarded or granted, the which does exempt any Man to answer for the Damages of his Servants, unless he foreknew that they would commit such a Piracy or Spoliation, or any way have abetted or consented to the same, which right may be forfeited, and the *Civil Law* let in to acquire satisfaction. And yet in the Case of Sir Edmond Turner and Mr. George Carew, who having Letters of *Reprisal* against the *Dutch*, Mr. Carew by Indorsement

B. R. Rolls
Abridg. 530.
Constit. Gallia
tom. 3. tit. 3.
Constit. anni
1583. c. 44.
Vide Moor's
Reports 776.

Vide the very
Letters of Re-
prizal, ante
fol. 34.

ment on the back-side of the Letters Patents did nominate and appoint one *Tyrence Byrne* to execute and perform all such acts and things as by force of the Letters Patents he might lawfully do: *Tyrence Byrne* provides Ship and Crew, and being at Sea takes a certain Ship belonging to *Bruges* called the *Godelife*, and there was some probable cause of suspicion, yet not enough to warrant a Condemnation: Whereupon the Owners, having had sentence of Restitution, libell'd in the *Admiralty* against Sir *Edmond Turner*, Mr. *Carew* and *Byrne*, for Damages; upon which a Sentence was given against the Defendants, who Appealing, the Delegates confirmed the first Sentence.

Hill. 30, 31.
Car. 2. at Ser-
jeants-Inn.

Leg. 2. sect.
cum in eadem:
D. ad l. Rhod.
Leg. quo nau-
frag. §. quod
ait. D. de incen.
Leg. quemad-
modum, sect.
item D. ad Leg.
Aquiliam.
27 H. 8. cap.
4. §. 4.
Per Leg. Pom-
ponius de acqui-
rer dom.

XX. But if a Ship shall be at Sea and in necessity, if she attacks another Ship, and takes out some Victuals, Cables, Ropes, Anchors or Sails, (especially if that other Ship may spare them) this is not *Piracy*; but then the Party must pay ready Money for such things, or give a Note or Bill for the payment of the value; if on this side the *Straits* of *Morocco*, within four Months, if beyond within twelve Months.

Per Leg. Multi-
er, eod. cap.
& post.

XXI. By the *Law Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the Attempt is conquered, the *Prize* becomes absolutely the Captor's, saving the account to be rendered to the *Admiral*. And it is accounted in Law a just Caption of whatsoever may be got or taken from such *Beasts of Prey*, be the same in their own or in their Successors Possession. But then an account ought to be rendered to the *Admiral*, who may (if they happen to be the Goods of the Fellow-Subject of the Captors,

tors, or of Nations in amity with his own Sovereign) make restitution to the Owner; the costs and charges, and what other things, in equity shall be decreed to the Captor, first considered and deducted.

XXII. By the *Statute of 27 Edw. 3. cap. 3 Bul. 28, 29. 13.* if a Merchant lose his Goods at Sea by Piracy or Tempest (not being wrecked) and they afterwards come to Land; if he can make proof they are his Goods, they shall be restored to him in places *Guildable*, by the King's Officers, and six Men of the Country; and in other places by the Lords there and their Officers, and six Men of the Country. If a Pirate takes Goods upon the Sea, and sell them, the Property is not thereby changed, no more than if a Thief upon the Land steals them and sells them. *Godb. 193 Barber's Case.*

This Law hath a very near relation to that of the Romans, called *De Usu-Captione* or the *Atinian Law*; for *Atinius* Enacted, That the Plea of Prescription or long possession, should not avail in things that had been stolen, but the Interest which the right Owners had should remain perpetual; the words of the Law are these, *Quod surreptum est, ejus rei aeterna auctoritas esset*, where by *Auctoritas* is meant *Jus Domini*.

XXIII. Yet by the *Common Law of England*, it has been held, That if a Man commit Piracy upon the Subjects of another Prince or Republick (though in League with us) and brings the Goods into *England*, and sells them in a *Market Overt*, the same shall bind, and the owners are for ever concluded; and if they should go about in the *Admiralty*

Bingley's Case
1. Roll's
Abridgment,
fol. 530. Lit.
C. 4.
Grotius, lib. 3.
c. 9. *sec. 16.*

to

(a) This is a Report of two Cases where a prohibition was granted, because the contract was made on Land and under Seal; and so not to the purpose. *Sed vid. Cro. El. 685. Yelv. 135. 1 Sid. 320, 367. 2d. Saun. 260. 2d. Lev. 25. 1st. Ven. 173, 308.* Where it is held, that if the Admiral hath Jurisdiction of the Orig. Cause, the Matters depending thereon shall be tried in the Admiral's Court, tho' they arise on the Land.

to question the Property in order to Restitution, they will be prohibited. (a) *Hob. 79.*

In *Trower* for Goods of 400*l.* value, Motion was for a Trial at Bar, the Goods being taken by a *Spanish* Caper, and brought into *Plymouth*, and from thence shipped away without Condemnation, because tho' *Bl. Property* 38. says, the Property is altered by the Enemy's possession above 24 hours, which is good when they are brought into safe Port of an Enemy's Country, yet the constant Opinion of the *Civilians* and the Practice at *Guildhall* in the *Dutch* War, is, that if such Goods be brought into a Neutral Port, or, as these were, into a Friend's, the Property is not altered till Condemnation, and these Goods were taken from a *French* Man in League with us, which is stronger; and this being matter of Evidence, tho' the Defendant was only a Factor in *England*, could not condemn the Goods, but the condemnation was in *Holland*, whither they were shipped; yet the Trial at Bar was granted. 3. *Keble* 397. *Kerdale* con. *Marten*. Like Case *Radley* and *Delbow* against *Eglesfield & al.* 2 *Sand.* 259. 1 *Vent.* 173.

Several Persons were Owners of a Ship, which they sent to the *Indies* to merchandize, upon the High Sea the Mariners and Residue commit Piracy. Upon the Return of this Ship to the River of *Thames* the Admiral seized her, as *Bona Pyratarum*, the Merchants took the Sails and tackle out of the Ship. The Admiral shall not have the Goods stolen from other Men, but the Owner shall have them, 1 *Rob. Rep.* 285. the Case of *Hildebrand* and others.

XXIV. This

XXIV. This offence was not punishable by the *Common Law*, as appears by the Preamble of the *Stat. of 28 H. 8. cap. 15.* but the same was determined and judged by the *Admiral*, after the course of the *Civil Law*; but by force of the said *Act*, the same is inquired of, heard, and determined according to the course of the *Common Law*, as if the offence had been committed on *Land*.

But by *Lord Hale*, in *Hist. Pl. Cr. Vol. 2. p. 14, 15.* The Court of *King's-Bench* had certainly a concurrent Jurisdiction with the Admiralty, in Cases of Felonies done upon the narrow Seas or Coast, though it were High Sea, because within the King's Realm of England: But this Jurisdiction of the *Common Law* Courts was interrupted by a special Order of the King and Council, 35 *Ed. 3.* And since 38 *Ed. 3.* it does not appear, that the *Common Law* Courts took Cognizance of Crimes committed upon the High Seas.

Stat. 11. and 12. W. 3. cap. 7. All Piracy, Trial of Pirates, Felonies, and Robberies committed in racy. or upon the Sea, or in any Haven, River, Creeks, or Place where the Admiral hath Jurisdiction, may be tried at Sea, or upon the Land, in any of his Majesty's Islands, Plantations, Colonies, &c. appointed for that purpose by Commission under the Great Seal of England, or Seal of the Admiralty, directed to such Commissioners as his Majesty shall think fit, who may commit such Offenders and call a Court of Admiralty thereupon, to consist of seven Persons at the least.

And for want of seven, then any three of the Commissioners may call others as therein is mentioned.

The

The Persons so assembled may proceed according to the course of the Admiralty, and give Sentence of Death and award execution of the Offenders, who shall thereupon suffer Loss of Lands, Goods and Chattels.

The Register of the Court, or if none be, the President to take Minutes of the Proceedings, and transmit the same to the Admiralty Court in *England*.

If any natural born Subjects or Denizens of *England* commit Piracy or any act of Hostility, against any of his Majesty's Subjects at Sea, under Colour of a Commission or Authority from any Foreign Prince or State or Person whatsoever, such Offenders shall be adjudged Pirates.

If any Commander or Master of a Ship, or Sea-man or Mariner, turn Pirate, or give up his Ship, &c. to Pirates, or combine to yield up, or run away with any Ship, or lay violent Hands on his Commander, or endeavour to make a Revolt in the Ship, he shall be adjudged a Pirate and suffer accordingly.

All Persons who after the 29th of *September* 1700, shall set forth any Pirate (or be aiding and assisting to any such Piracy) committing Piracy on Land or Sea, or shall conceal such Pirate, or shall receive any Vessel or Goods, Piratically taken, shall be adjudged accessory to such Piracy, and suffer as Principals, according to the Statute of 28 *H.* 8. which is hereby declared to be in force.

When any *English* Ship shall have been defended by Fight against Pirates, and any of the Officers or Seamen killed or wounded, the Judge of the Admiralty or his Surrogate in *London*, or the Major or chief Officer in the Out-Ports, assisted by four substantial Merchants,

chants, may by Process out of the said Court levy upon the Owners of such Ships, &c. a Sum not exceeding 2*l.* *per Cent.* of the Value of the Freight, Ship and Goods so defended, to be distributed among the Officers and Seamen of the said Ships, or Widows and Children of the slain.

A Reward of 10*l.* for every Vessel of 100 Tons or under, and 15*l.* for every Vessel of a greater Burden, shall be paid by the Captain, Commander or Master, to the first Discoverer of any combination for running away with, or destroying any such Ship at the Port where the Wages are to be paid.

The Commissioners aforesaid shall after the 29th of *September* 1700, have the sole power of trying the said Crimes, and Offences within the Colonies and Plantations in *America*, governed by Proprietors, or under Grants, or Charters from the Crown, and may issue their Warrants for apprehending such Pirates, &c. and their Accessories in order to their being tried there, or sent into *England*.

Commissions for the Trial of the said Offences sent to any Place within the Jurisdiction of the Cinque Ports, shall be directed to the Lord Warden of the Cinque Ports, or his Lieutenant, and such Persons as the Lord Chancellor shall appoint; and the Trial to be by the Inhabitants of the Cinque Ports.

All Seamen, Officers and Sailors, who shall desert the Ships or Vessels, wherein they are hired for a Voyage, shall forfeit their Wages.

If any Master of a Merchant Ship or Vessel shall after the 29th of *September* 1700, during his being abroad, force any Man ashore, or wilfully leave him behind, or refuse to bring all his Men home again, who are in a Condition

dition to return, he shall suffer three Months Imprisonment.

The above Act 11 and 12 *W. 3. ch. 7.* was continued by 1 *Geo. 1. ch. 25.* for five Years, &c. and was made perpetual by 6 *Geo. 1. ch. 19.* And 'tis enacted by 4 *Geo. 1. ch. 11. sec. 7.* That all Persons who shall commit any Offence for which they ought to be adjudged Pirates, Felons, or Robbers, by 11 and 12 *W. 3.* may be tried and judged for every such Offence, according to 28 *H. 8.* and shall be excluded from their Clergy.

By *Stat. 8. Geo. ch. 24. Sect. 12.* perpetuated by 2 *Geo. 2. c. 28.* If any Commander of a Ship, or other Person, shall any wise trade with any Pirate, or shall furnish any Pirate with Ammunition or Stores, or fit out any Ship with such design, or confederate or correspond with any Pirate, knowing him to be such, such Person shall be adjudged guilty of piracy, and shall be tried according to *Stat. 28. H. 8. ch. 15.* and *Stat. 11 and 12 W. 3. ch. 7.* and being convicted shall suffer as a Pirate. And persons belonging to any Ship, who shall upon meeting any Merchantman upon the High Seas, forcibly board such Ship, and though they do not carry off such Ships, shall throw overboard or destroy any part of her Goods, shall be punished as Pirates.

And *ibid. sec. 2.* Every Ship fitted out with design to trade with, or supply any Pirate, and all the Goods put on board such Ship, shall be *ipso facto* forfeited, one Moiety to the King, and the other to the Informer, to be recovered in the High Court of Admiralty.

And

And *ibid.* *sec.* 3. All persons declared Accessories by 11 and 12 *W.* 3. are hereby declared principal Offenders.

And by *sec.* 4. Offenders convicted on this Act are excluded Clergy.

By *Stat.* 18 *Geo.* 2. *c.* 30. *Seet.* 1. All Persons being natural-born Subjects or Denizens, who during the present or any future Wars shall commit any Hostilities upon the Sea, or in any Place where the Admirals have Jurisdiction, against his Majesty's Subjects, under colour of any Commission from any of His Majesty's Enemies, or shall be any other-ways adherent to his Majesty's Enemies upon the Sea, or where the Admirals have Jurisdiction, may be tried as Pirates, Felons, and Robbers, in the Court of Admiralty, on Ship-board, or upon the Land, and being convicted shall suffer such Pains of Death, Loss of Lands and Goods, as any other Pirates ought by 11 *W.* 3. *cap.* 7. or any other Act.

By *seet.* 2. Any Person tried and acquitted, or convicted according to this Act, shall not be liable to be prosecuted or tried again in *Great Britain* or else where for the fact, as High-Treason.

By *seet.* 3. Provided that nothing in this Act shall prevent any Persons guilty of any of the said Crimes, who shall not be tried according to this Act, from being tried for High-Treason within this Realm, according to the 28 *Hen.* 8. *cap.* 15.

Piracies and Robberies on the Seas are excepted out of the General Pardon by *Stat.* 20. *Geo.* 2. *c.* 52. *Seet.* 13.

XXV. The Act 11 and 12 *W.* 3. *ch.* 7. does not alter the Offence, or make the Offence

*Coke 3. Instit.
Tit. Admir.*

fence Felony, but leaves the Offence as it was before this Act, viz. Felony only by the *Civil Law*, but giveth a mean of Trial by the *Common Law*, and inflicteth pains of death, as if they had been attainted of any Felony done upon the Land. The Indictment must mention the same to be done upon the High Sea.

Note, By 2 *Geo. 2. ch. 21.* If any Person be feloniously stricken, or poisoned upon the Sea, or at any place out of *England*, and dies in *England*, or stricken or poisoned in *England*, and dies on the Sea, or out of *England*; the Fact is triable in any County, according to the Course of the Common Law, except Challenges for the Hundred.

*Moore 756,
Dy. 308.* But if the Party be attainted before the Admiral, and not before the Commissioners, then there is no corruption of Blood or forfeiture of Lands; *quod nota.*
1 Inst. 391.
vid. postea
§. 30.

XXVI. A pardon of all Felonies does not extend to Piracy, but the same ought especially to be named; and though there be a Forfeiture of Lands and Goods, yet there is no corruption of Blood, nor can there be an Accessory of this offence, tired by virtue of this Statute; but if there be an Accessory upon the Sea to a Piracy, he must be tried by the *Civil Law*,

The Statute of 35 *H. 8. cap. 2.* taketh not away the Statute for Treasons done upon the Sea, nor is Clergy allowable to the Party on the Statute 28 *H. 8. vide 14 Jac. in B. R.*

Moore 756 plac. 1044. 3 Inst. 112.

XXVII. Though a Port be *Locus publicus uti pars Oceani*, yet it hath been resolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

Hide and others robbed the Ship of Captain *Slue*, of the Merchandize of one *Mr. Moss*,

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate assaults him and robs him, this is not Piracy, because the same is not done *super altum Mare*; but this is a down right

right Robbery at the *Common Law*, for that the Act is *infra corpus Comitatus*, and was in-
 quirable and punishable by the *Common Law*,
 before the *Statute of 28 H. 8. cap. 15.*

were found guilty of the same, *Anno 22 Car. 2. at the*

XXVIII. So if such a *Piracy* or Robbery be made in a *Creek* or *Port*, in such cases it has been conceived, that *Clergy* is allowable upon the *Statute of 28 H. 8.* but if it be done *super altum Mare*, there no *Clergy* is allowable; howbeit, if such a Robbery be committed on great Rivers within the Realm, which are look'd upon as common Highways, there perhaps *Clergy* may not be granted; and so it was rul'd in the aforesaid Case of *Hyde*, who with a parcel of Men came one Night in a Boat in the River of *Thames*, and under the colour of *Press-Masters*, boarded the Ship of one Captain *Slue*, and robb'd her, for which being taken and tried at the *Old-Baily*, by the greater opinion of the Judges there present, 22 *Car. 2. Clergy* was denied him. By the Pardon of all Felonies, at the *Common Law*, or by the *Statute-Law*, *Felony super altum Mare* is not pardonable; for though the King may pardon this Offence, yet being no Felony in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not to it; for this is a special Offence, and ought especially to be mentioned.

XXIX. One *Cobham* was arraigned in *Southwark*, before the Commissioners of Oyer and Terminer, for a *Piracy* and Robbery committed on a *Spaniard*, & *stetit mutus & noluit directe respondere*: And it being moved

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H

by

a Merchant in *London*; and they were indicted for it at the *Common Law*, and *Old-Baily.*

Moore 756.

1 *Jac. Par.*

1044.

And the same was so ruled by the opinion of Sir *Lyonel Jenkins*, and the rest of the Judges, upon the *Piracy* committed by *Cusack* and others; and he was executed

Anno 1674.

vide 19 E. 3. 124.

9 *H. 4. 2.*

Mo. 756. 1

Inst. 191. Dy. 308.

by the Attorney-General, whether he ought to have the Judgment of *pain fort & dure* in this Case, *Saunders*, Chief Baron, *Brown* and *Dyer* were of Opinion he should, and that by the Words and reasonable Intendment of the Statute of 28 H. 8. c. 15. and according to the Opinion *supra*, the Judgment was given by *Carus* Serjeant. Dy. 241. pl. 49.

9 E. 4. 28. cited in *Coke's* 3. *Instit.* fol. 112.

XXX. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works *no corruption* of blood, by virtue of that Attainder; nor can there be any Accessory of Piracy by the Law of this Realm; but if it falls out that there is an Accessory upon the Sea, such Accessory may be punished by the *Civil Law*, before the Lord *Admiral*, but he cannot be punished by virtue of this Act, because it extends not to Accessories, nor makes the Offence Felony.

28 Eliz. *Butler's* Case cited, 3. *Instit.* fol. 113.

XXXI. If one steal Goods in one County, and brings them into another, the Party may be indicted in either County; but if one commits Piracy at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon the Statute, for that the original taking was not Felony, whereof the *Common Law* took Cognizance.

Marsh's Case, 13 Jac. in B. R. 3. *Bulstrode*. 27. 1 *Roll. Rep.* 175. 4 *Instit.* 152.

XXXII. If a Man is taken on suspicion of Piracy, and a Bill is preferred against him, and the Jury find *Ignoramus*; if the Court of Admiralty will not discharge him, the Court of *King's-Bench* will grant a *Habeas Corpus*, and if there be good Cause, discharge him, or at least take Bail for him: But if the Court suspects that the Party is guilty, perhaps they may remand him; and therefore

fore in all cases, where the Admiralty legally have an original, or a concurrent Jurisdiction, the Courts above will be well informed before they will meddle.

Trespass for breaking a Ship, and taking away the Sails; the Defendant justified by warrant out of the Admiralty, by which he entered the Ship, and took away the Sails. *Justification in Tres. by warrant of the Admiralty.* Objection, The breaking is not answered, *per Curiam* its good enough, for the entry is a breaking in Law, as *Clausum fregit*, &c. And that he may carry away the Sails, because this is the manner of their proceedings, and grounded upon Reason; because the Ship cannot be kept safe, if the Sails be not carried away. *Creamer against Tokely, Latob 188.*

Suit in the Admiralty, the Defendant pleaded the Statute of Limitation; if that Court deny the Plea, Prohibition will be granted, or if they do receive the Plea, but will not give Sentence accordingly, Prohibition will go. *Statute of Limitation pleadable there.* *Hardres 502. Berkly and Morris.*

If a Man be in custody for Piracy, if any aids or assists him in his Escape, though that matter is an Offence at Land, yet the Admiralty having Jurisdiction to punish the principal, may have likewise power to punish such an Offender, who is looked upon *quasi* an Accessory to the Piracy; but to rescue a Prisoner from an Officer of theirs, they may examine the cause, but they cannot proceed criminally against the Offender. *Yakusson 134, 135. Cro. El. 685. Cro. Jac. 269. Stiles 171, 340.*

The Exemplification of the Sentence of the Court of Admiralty, under their Seal, is conclusive Evidence in a Court of Common Law. 2 Lord Raymond, 893.

50 *Elix.* 3.*par.* 2 *Dorf.*24. *de audiend.*& *terminand.**Mercatoribus**super mare de-**prædatis.**Pat.* 6. *E.* 1.*m.* 24. *Dorf.*

the Case of

*Will. de Dun-**staple, a Citi-**zen of Win-**ton. Pat.* 32*E.* 1. *m.* 4.3 *Bulstrode* 27.

XXXIII. Antiently when any Merchants were robbed at Sea, or spoiled of their Goods, the King usually issued out *Commissions* under the *Great Seal of England*, to enquire of such depredations and robberies, and to punish the Parties; and for frauds in Contracts, to give Damages to the Parties, and proceed there- in *secundum Legem & consuetudinem Angliæ*, *secundum Legem Mercatoriam*, & *Legem Mari- timam*; all three Laws included in the *Com- missions*.

Dorf. pro Willielmo Perin & Domingo Perez Mercatoribus.

XXXIV. The Courts of *Westminster* have a Sovereign power to enquire after the Liberty of every Man, and that he should not be de- prived of the same without just cause; and therefore as in other capital Causes, so like- wise in this they may send their *Habeas Cor- pus* to remove the Body of any committed upon such an account, and if they see a just cause, they may either bail, or discharge, or remand, as the matter shall seem just before them.

*Coke, 3 Instit.**fol.* 113.

And altho' the Statute of 28 *H.* 8. c. 15. does not alter the offence, or make the of- fence felony, but leaveth the offence as it was before that Statute, (*viz.*) Felony only by the *Civil Law*, and gives a mean of Trial by the *Common Law*, and inflicted such pains of death as if they had been attainted of any

* *Seff. Admir.**Feb.* 18, 1680.Case of *Comp-**son Gwyther.*& *al.*

Felony; yet it was resolved * by all the Judges, and the rest of the Commissioners then present, that his Majesty having grant- ed Letters of Reprizal to Sir *Edmond Turner* and *George Carew*, against the Subjects of the *States General* of the *United Provinces*, and

and that afterwards that Grant was called in by Proclamation, then mortified in the Treaty of *Breda*, and afterwards superseded under the Great Seal: That *Carew*, (without *Turner*) having deputed several to put in Execution the said Commission, who accordingly did; and being indicted for Piracy, the same was not a felonious and a piratical Spoliation in them, but a Caption in order to an Adjudication; and though the Authority was deficient, yet not being done by the Captain and his Mariners, *animo deprædandi*, they were acquitted.

C H A P. V.

The Right of the Flag, as to the acknowledging the Dominion of the British Seas.

- I. *Considerations general as in reference to the same.*
- II. *Whether Princes may have an exclusive Property in the Sea.*
- III. *That such an exclusive Dominion may be, proved.*
- IV. *Of the Sea, whether capable of Division as the Land.*
- V. *Considerations general, in reference to Maritime Cities touching Sea Dominion.*
- VI. *Of the Sea, by reason of its instability, whether capable of subjection.*
- VII. *Of the Dominion of the British Sea asserted long before, and ever since the Conquest of this Isle by the Romans.*
- VIII. *The Duty of the Flag, but a consecutive Acknowledgment of that Right. And of the Ordinance of Hastings declaring that Customary Obedisance.*
- IX. *Considerations had on some Treaties, in reference to asserting the Duty of the Flag.*
- X. *Of the extent how far that duty is required and payable.*
- XI. *Of the duty of the Flag, not a bare Honorary Salute, but a Right.*
- XII. *Of the importance and value of the same, as well in Nations Foreign, as in England.*
- XIII. *Of the effects of such a Right and Sovereignty. Of the extent of this Dominion by the Laws of England.*
- XIV. *Of the Duty of the Flag not regarded as a Civility, but commanded as a Duty.*
- XV. *Of the importance of that acknowledgment.*

I. **A**FTER the Writings of the Illustrious Selden, certainly 'tis impossible to find any Prince or Republick, or single Person endued

endued with Reason or Sense, that *doubts* the *Dominion* of the *British Sea*, to be entirely subject to that *Imperial Diadem*; or the *duty* or *right* of the *Flag*, which indeed is but a *consecutive* Acknowledgment of that ancient *Superiority*: Yet there have not been wanting some, who though they have not questioned the former, have highly disputed the latter.

But there are some fatal Periods amongst our *Northern Regions*, when the Inhabitants do become so brutal and prejudicate, that no obligation of Reason, Prudence, Conscience or Religion can prevail over their Passions, especially if they become the devoted *Mercenaries* of an implacable *Faction* †, in opposi- † *Lovestein.* tion to all that can be called either just or honourable; we need not rip up the Carriage of that late insolent Son of a *Tallow-Chandler*, whose Deportments made him no less insupportable at home, than he was amongst *Foreign Princes*; the testimonies of his greatest Parts and Abilities being no other than Monuments of his *Malice* and *Hatred* to this Nation, and Records of his own *folly*. But Princes are not to be wrangled out of their ancient *Right* and *Regalities* by the subtil Arguments of *Wit* and *Sophistry*; nor are they to be supplanted or overthrown by Malice or Arms, so long as God and good Men will assist, in which his sacred Majesty did not want, when he asserted his Right with the Blood and Lives of so many Thousands that fell in the dispute.

II. That Princes may have an *exclusive property* in the *Sovereignty* of the *several parts* of the *Sea*, and in the *passage*, *Fishing* and *Shores*, is so evidently true by way of fact, as no man that is not desperately impudent can deny it;

the Considerations of the general *practice* in all Maritime Countries, the necessity of *order* in mutual Commerce, and the *Safety* of mens persons, goods, and lives, hath taught even the most *Barbarous Nations* to know by the Light of *human Reason*, that *Laws* are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and trade on the firm Land; and that to make *Laws*, and to give them the *Life* of Execution, must of necessity require a *supream Authority*; for to leave every part of the Sea and Shores to an *arbitrary and promiscuous Use*, without a correcting and securing Power in case of wrong or danger, is to make Men in the like Condition with the Fishes, where the greater devour and swallow the less.

III. And though the Sea is as the *Higbway*, and common to all; yet it is as other *Higbways* by Land or great Rivers are, which though *common and free*, are not to be usurped by private Persons to their own entire Service, but remain to the use of every one: Not that their Freedom is such, as they should be *without Protection or Government* of some Prince or Republick, but rather not *exclude* the same; for the true ensign of Liberty and Freedom is *Protection from those that maintain it in liberty*.

See that Plea of *Chiozzola* for the *Venetian* Sovereignty of the *Adriatick Sea*, at the end of Mr. Selden.

IV. And as the Sea is capable of Protection and Government, so is the same no less than the Land subject to be divided amongst Men, and *appropriated to Cities and Potentates*, which long since was ordained of God as a thing most natural; whence it was that *Aristotle* said, *That unto Maritime Cities the Sea is the Territory, because from thence they take their sustenance and defence*; a thing which cannot be, unless

unless part of it might be appropriated in the like manner as the Land is, which is divided betwixt Cities and Governments, not by equal Parts, or according to their greatness, but according as they are able to rule, govern, and defend them; Berne is not the greatest City of Switzerland; yet she hath as large a Territory as all the rest of the twelve Cantons put together: The Cities of Noremburg and Genoa are very rich and great, yet their Territories hardly exceed their Walls; and Venice, the Mistress and Queen of the Mediterranean, was known for many Years to be without any manner of Possession on the firm Land.

V. Again on the Sea, certain Cities of great Force have possessed large quantities thereof; others of little Force have been contented with the next Waters.

Neither are there wanting Examples of such, as notwithstanding they are Maritime, yet having fertile Lands lying on the back of them, have been contented *there-with* without ever attempting to gain any Sea-Dominion; others who being awed by their more mighty Neighbours, have been constrained to forbear any such attempt; for which two causes a City or Republick, though it be Maritime, yet it may remain without any possession of the Sea. God hath instituted Principalities for the maintenance of Justice to the benefit of Mankind; which is necessary to be executed as well by Sea as by Land: St. Paul saith, that for this cause there were due to Princes, Customs and Contributions.

The substance of what was alledged by the *Hansaticque* Towns, at the *Venetians* asserting of the Sovereignty of the *Adriatick*, *Inter res communes, uti ipse Imperator nunciat mare, & ideo nemo in mari piscari; aut navigare prohibetur, & adversus inbibentem competit actio injuriarum, l. 10.*

si quis in mare, l. injuriarum, sect. ult. de injuriis. Sin littora quoque communia sunt l. 2. re divers. Quia accessorium sunt maris, & accessorium sequitur naturam Principalis, l. 2. de peculio. legat. c. accessorium de reg. jur. in 6. Ad littus maris igitur accidere quisvis potest, non piscandi

candi tantum gratia, sed etiam ædificandi & occupandi causa quod in tit. de acquirend. Dom. l. in litt. ff. ne quid in loc. pub. Jo. Angelus J. C. de repub. Hansfat. par. 6. fol. 85. Edit. Francof. An. Dom. 1641. But these arguments were easily answered by the Venetian Lawyers; *Quemadmodum communio littorum restringitur ad populum, à quo occupata sunt, lib. 3. sect. littora. D. de quid in loc. pub. Ita etiam communio maris: adeo ut per mare à nemine occupatum navigatio sit omnino libera: per mare autem occupatum ab aliquo Principe ii liberam habeant navigationem qui sunt illi Principi subiecti; alii verò eatenus, quatenus idem Princeps permittit.* Julius Pacius de Dom. maris Adriatici.

It would be a great absurdity to praise the well Government and Defence of the Land, and to condemn that of the *Sea*; nor doth it follow, because of the vastness of the *Sea*, that it is not possible to be governed and protected; but that proceeds from a defect in Mankind; for Desarts, though part of Kingdoms, are impossible to be governed and protected, witness the many Desarts in *Africk*, and the immense vastities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and publick Power be ruled, protected, and governed; so the same happens to the *Sea*, and those † are deceived by a gross equivocation, who aver that the *Land*, by reason of its *stability*, ought to be subjected, but not the *Sea*, for being an unconstant *Element*, no more than *Air*; forasmuch as they intend by the *Sea* and the *Air* all the parts of the fluid *Elements*, it is a most certain thing that they cannot be brought under *Subjection* and *Government*, because whilst a Man serves himself with any one part of them, the other escapes out of his power; but this chanceth also to *Rivers*, which cannot be detained; but when one is said to rule over a *Sea* or *River*, it is understood not of the *Element*, but of the *Site* where they are placed; The Waters of the *Adriatick* and *British Seas* continually run out thereof, and yet it is the same *Sea*; as the *Tyber*,

† Grotius mare liberum. Communio parit discordiam: quod communiter possidetur, vitio naturali negligitur: Habet communio rerum gerendarum difficultatem Leg. pater. §. dulcissime Leg. 2.

Tyber, Poe, Rhyne, Thames, or Severn, are the same *Rivers* they were a Thousand Years since; and this is that which is subject to Princes by way of *Protection and Government*.

Again, it would seem ridiculous if any Man would assert that the Sea, ought to be left without Protection, so that any one might do therein well or ill, robbing, spoiling, and making it unnavigable, or whatsoever should seem fitting in their Eyes; from all which it is apparent, that the *Sea ought to be governed* by those to whom it most properly appertains by the Divine Disposition.

VII. When * *Julius Caesar* first undertook • *Qui omnia* the Invasion of this *Isle*, he summoned the *fere Gallis* neighbouring *Gauls* to inform him of the *erant incognita, neque enim temere* *Shores, Ports, Havens*, and other things convenient that might accelerate his intended *Conquest*; but from them nothing could be *prator mercatores adit ad* had, they answering, All Commerce and *illos quisquam, neque eis ipsis quidquam praeter oram maritimam atque* Traffick, and visiting their Ports, was *ear regiones quae sunt contra Galliam notum est. Com. Gall. Bell. lib. 4. fol. 72. m. 8.* *interdicted to all Nations before licence had*; nor could any but Merchants visit the same, and then had they places † assigned them whither they should come; nor was this Dominion that the *Britains* then used, commanded without a *Naval Force*; the sight of which when *Caesar* saw, he preferred them before those of the *Romans*: For upon that occasion it was that *Caesar*, having seen those *Auxiliary Squadrons*, which the *Britains* sent the *Gauls* in their Expeditions against the *Romans*, took occasion to find out that Warlike People, whose bare Auxiliary Aid shook the Flower of the *Roman Squadrons*.

† *Gauls Town near Farnmouth being then, as is conceived, one of the common places of Mart or Commerce for the Gauls. Quod omnibus fere Galli beneficiis nostris inde subministrata auxilia intelligebat.*

And

And when the *Romans* became *Conquerors* of this *Isle*, the same *Right* or *Dominion* was during all their time supported and maintained, when they sailed round their new achieved *Conquests* in the time of *Domitian*,
Tacit. in vita Agricola giving terror to all the neighbouring
Nations.

But when that *Mighty Empire* became subject to Fate, and this *Nation*, by the continual supply of Men, which went out of the Kingdom to fill up the Contingencies of the *Roman* Legions, became at last so enfeebled as to render us a Prey to the *Saxons*; which *Empire* having settled Peace with their *Danish* Neighbours, and quieted their own homebred Quarrels; and having reduced the several petty Kingdoms of their *Heptarchy* under one *Diadem*, they forgot not to assume their antient *Right and Dominion of the Seas*; as did the most Noble *Edgar* †, who kept no less a Number than 400 *Sail of Ships*, to vindicate and ascertain his *Dominion*, giving Protection to the peaceable, and punishment to the offenders: Nor did his Successors *Etbeldred*, *Canutus*, *Edmond*, and others that followed of the *Danish Race*, any ways wave, relinquish or lose that Royalty, but obsequiously maintained the same down to the *Conqueror*, and from him since for upwards of 1200 years in a quiet and peaceable Possession.

† *Altitonantis
 Dei largiflua
 clementia qui
 est Rex Re-
 gum; Ego
 Edgarus An-
 glorum Basileus, omnium-
 que regum
 Insularum Oc-
 ceani, quæ Bri-
 tanniam cir-
 cumjacent,
 cunctarumque*

Nationum quæ infra eam includuntur, Imperator & Dominus. Ex Chart. fundam. Eccles. Wigor. Sir John Burroughs, fol. 17. Idem quoque Edgarus 400. Naves congregavit, ex quibus omni anno post Festum Paschale 100. Naves ad quamlibet Angliæ partem statuit; sic æstate Insulam circumnavigavit: hyeme verò judicia in Provincia exercuit. Ex Rannulph. Cestrenf. fol. 22. J. B.

To mention the antient *Commissions*, and Exercise of this Sovereign Power, *Safe-Conduct*, *Writs of Seizure*, *Arrests*, *Records of Grants*,

Grants, and Licences to pass through the Sea and to fish, *Parliament Rolls*, and the like, + + So fully would make a Volume; in a word, if *Right* proved by *of Prescription, succession of Inheritance, continual Claim, matter of Fact, consent of History* and *Confessions*, even from the Mouths and Pens of *adversaries*, be of any moment to the asserting of a Title, his Sacred Majesty may be presumed to have as good a Title to that, as the most absolute Monarch this day on Earth, hath to whatever he can claim or does enjoy. 1 *Roll. Ab.* 528. pl. 2.

Mr. Selden, that it would be impertinent in this Tract to rehearse the authorities he vouches. *Vide Jac. Usher. Armach. Epis. Hiberniae Sylloge,* p. 121, 163.

VIII. Now the Duty of the Flag is no more but a consecutive acknowledgment that the *Right* and *Dominion* of the *British Seas* (not as a bare *Honorary Salute* or *Ceremony*, but as an *absolute Sign* of the *Right* and *Sovereignty* of those *Seas* where they are obliged to strike Sail; are in him to whose *Flag* they veil, and pay that duty to; and in substance is no more, but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that obeisance and duty, like those services when Lords grant out Estates, reserving a *Rose* or *Pepper-Corn*, the value of which is not regarded, but the remembrance and acknowledgment of their *Benefactor's Right* and *Dominion*.

The Duty of the *Flag* or *Salutation*, is to be paid not only by *Foreigners*, but also by natural-born Subjects, and such who refuse to pay the same, may be brought to the *Flag* to answer that Contempt.

To be paid by Natives as well as Foreigners.

That this hath been an *Antient Custom*, always waiting on that *Sovereignty*, appears by that memorable Record upwards of 500 years since made, where it is declared by King *John* what

Inter Leg. Marinas sub fine anni regni Regis Johannis secundi. Entitled, Le Ordinance al Hastings.

what the *Antient Custom* was, in these Words ;
 “ That if a Lieutenant in any Voyage, being ordained by Common Council of the Kingdom, do encounter upon the Sea any Ships or Vessels, laden or unladen, that will not strike and veil their Bonnets at the Commandment of the Lieutenant of the King, but will fight against them of the Fleet, that if they can be taken, they be reputed as Enemies, and their Ships, Vessels, and Goods taken and forfeited as the Goods of Enemies, although the Masters or Possessors of the same would come afterwards and alledge, that they are the Ships, Vessels, and Goods of those that are Friends to our Lord the King ; and that the common People in the same be chastised by Imprisonment of their Bodies for their Rebellion, by discretion.”

Leon Lessius de lours justic. & jur. l. 2. c. 2. dub. 19.

Thus this *Immemorial Custom* was by that prudent Prince affirmed, the which hath been always before, and ever since (without interruption) by all Nations constantly paid to the *Ships of War*, bearing the *Royal Standard*, and other of his Majesty's *Ships*, wearing his *Colours and Ensigns of Service* ; he knowing that undoubted Maxim of State, *That Kingdoms are preserved by reputation, which is as well their strongest support in Peace, as their chiefest safety in time of War ; when once they grow despised, they are either subject to Foreign Invasions, or Domestick Troubles, the which (if possible) that Prince would have prevented, but he lived when those Celestial Bodies, which govern the actions of Princes, seemed to frown on the most Virtuous and Wise.*

IX. And as there is no Nation in the World more tender and jealous of their Honour than the *English* ; so none more impatiently tolerate the

the diminution thereof. Hence it was that in all Treaties, before any thing was ascertained, the *Dominion of the Seas*, and *striking the Top-sail*, was always first provided for.

In the Year 1653, after the *Dutch* had measured the length of their Swords with those of this Nation, and being sensible of the odds, had by their four *Ambassadors* most humbly besought Peace, this very Duty of the *Flag* was demanded by the 15th *Article* in these words :

“ That the Ships and Vessels of the said United Provinces, as well Men of War as others, be they in single Ships, or in Fleets, meeting at Sea with any of the Ships of this State of *England*, or in their service, and wearing the Flag, shall strike the Flag, and lower their Top-sail, until they passed by; and shall likewise submit themselves to be visited if thereto required, and perform all other respects due to the said Commonwealth of *England*, to whom the Dominion and Sovereignty of the *British* Seas belong.”

an immemorial prescription and possession transmitted to us, and supposed as unquestionable by all Princes.

This was so peremptorily demanded, that without the *solemn acknowledgment of the Sovereignty over the British Seas*, there was no Peace to be had. As to the *acknowledging of the Sovereignty* and the *Flag*, they were willing to continue the *Antient Custom*, but that of *Visiting* was somewhat hard; 'tis true, the latter Clause was by the *Usurper* waved, for Reasons standing with his private Interest; but the first was (with the addition of these words — “ in such manner as the same hath been formerly observed in any times whatsoever”) made absolute by the 13th *Article* between

Note, That Cromwell was the first that ever inserted any such Article into any Treaty: Our Right and Dominion over the British Sea having never been disputed before, but by

Leo ab Antz- ma, fol. 847.

tween Him and that Republick, in these words: *Item quod Naves & Navigia dictarum Fœderatarum Provinciarum, tam bellica & ad Hostium vim propulsandam instructa, quàm alia, quæ alicui è Navibus bellicis hujus Reipublicæ in maribus Britannicis obviam dederint, vexillum suum è mali vertice detrabent, & supremum velum demittent, eo modo, quo ullis retrò temporibus, sub quocunque anteriori regimine unquam observatum fuit,* and from thence it was transcribed into the 10th Article at Whitehall, and afterwards into the 19th Article at Breda, and from thence into the 6th Article made last at Westminster, and that Clause of searching of each others Ships made reciprocate, by the 5th Article made in the Marine Treaty at London; but that extends not to Ships of War, but only to the Ships of Subjects.

Sept. 14,
1662.

Dec. 18, 1674.
S. V.

X. By the *British Seas* in the Article about the Flag are meant the four Seas, and not the Channel only; for in the 16th Article of the Treaty in 1653, they did expresse what was meant by the *British Seas* *.

* But now by the last treaty at Westminster the dominion is ascertained from Cape Finisterre to the middle point of the Land Van Staten in Norway, Feb. 9, 1674.

Les mers qui entourent les Isles Britanniques, was the Language proposed by the French Ministers at the Treaty of Utrecht: but the British Ministers insisted on *Maribus Bri-* “ That the Inhabitants and Subjects of the United Provinces may with their Ships and Vessels furnished as Merchant-Men, freely use their Navigation, sail, pass and repass, in the Seas of Great-Britain and Ireland, and the Isles within the same, commonly called the *British Seas*, without any wrong or injury to be offered them by the Ships or People of this Commonwealth; but on the contrary shall be treated with all love and friendly offices, and may likewise with their Men of

of War—not exceeding such a Number as *tannicis*; and shall be agreed upon—sail, pass and repass had it accordingly through the said Seas, to and from the Countries and Ports beyond them; but in case the said *States General* shall have occasion to pass through the said Seas with a great number of Men of War, they shall give three Months notice of their intention to the Commonwealth, and obtain their consent for the passing of such a Fleet, for preventing of jealousy and misunderstanding betwixt the *States* by means thereof.

The first part of this Article doth plainly set out the extent of the *British Seas*, and that it is not the bare *Channel* alone that comprehends the same, but the four *Seas*; and the same is further explained in the Great Case of *Constable's*, where the *Dominion* of the *Queen* *Hill 29 Eliz.* (before the Union) as to the Seas, did extend *B. R. the* mid-way between *England* and *Spain*, but *Queen and* entirely between *England* and *France*; the *Sir John Constable's Case,* *French* never had any right or claim to the *Leonard 3.* *British Seas*; for in the Wars between *Edward part 72.* *the First* and *Philip the Fair*, (all Commerce on both sides being agreed to be free, so that to all Merchants whatsoever there should be *inducie*, which were called *sufferantia Guerræ*, *Selden de Dom.* and Judges on both sides were appointed to *Maris l. 2. c.* take cognizance of all things done against *14. 27. 28.* these *Truces*, and should exercise *Judicium secundum Legem Mercatoriam & formam sufferantiae*) it was contained in the first provision of that League, that they should defend each others Rights against all others; this afterwards occasioned the introducing that Judgment in the same King's time, (before those *Coke 4 Instit.* Judges, chosen by both the said *Princes* by *142.* the *Proctors* of the *Prelates*, *Nobility*, and *High*

Higb Admiral of England, and all the Cities, Towns, and Subjects of England, &c. unto which were joined the suffrages of the most Maritime Nations, as Genoa, Catalonia, Spain, Almain, Zealand, Holland, Friezeland, Denmark and Norway, and divers other Subjects of the Roman Empire) against Reginer Grimbold, then Admiral of France, for that there being Wars between Philip of France and Guy Earl of Flanders, he had taken Merchants upon those Seas, in their Voyage to Flanders, and despoiled them of their Goods; whereas the Kings of England and their Predecessors (as they all jointly do declare and affirm) without all controversy beyond the memory of Man, have had the Supreme Government of the English Seas, and the Islands thereof.

1 Ro. Ab.
528. pl. 2.

An universal
consent of all
Nations.

Præscribendo scilicet Leges, Statuta atque interdicta armorum, naviumque alio ac Mercatoriis armamentis instructarum, causationes exigendo, tutelam præbendo, ubicunque opus esset, atque alia constituendo quæcunque fuerint necessaria ad pacem, jus & æquitatem conservandam inter omnimodas rates tam exteras quam in Imperio Anglicano comprehensas quæ per illud transierint; supremam iisdem item fuisse atque esse tutelam; merum mixtum Imperium in juredicendo secundum dictas Leges, Statuta, præscripta & interdicta, aliisque in rebus quæ ad summum Imperium attinent in locis adjudicatis.

Which memorable Record apparently
4. Instit. 142. shews, that the Kings of England have had
Selden cap. 27. *istud regimen & dominium exclusivè* of the King
Mare clausum. of France, bordering upon the same Seas, and
of all other Kings and Princes whatsoever;
and it was there adjudged, that Grimbold's Pa-
tent was an usurpation on the King of Eng-
land's Dominion, and he adjudged to make
satisfaction,

Sir John Bar-
roughs, fol. 42.

satisfaction, or if he proved unable, then the King his Master should, and that after satisfaction he be rendered to punishment.

And as the second part of the *Articles* of giving notice, it was but an Act of common Prudence; their late unexpected Visit, which they then gave, put the *English* to some surprise, but they facing the *Batavians*, soon made them know that they were as capable of beating them home, as they were then daring in coming out, and were not to be braved out of a *Dominion* and *Right*, which their Ancestors had with so much Glory acquired and asserted.

XI. By the *Article* of the Offensive and Anno 1635.
Defensive League between *France* and the *United Provinces*, it was agreed, That if at any time the *Dutch Fleet* (— which were to Leo ab Aitz-
scour the *French Coasts* in the *Mediterranean* maHist. Traß.
from *Pirates*) should at any time meet the pacis Belg.
French, the *Admiral* of the *Dutch* was to strike pag. 177.
his *Flag* and lower his *Top-sail* at his first ap- Edit. Lugduni
proach to the *French Fleet*, and to salute the Bataver.
Admiral of *France* with *Guns*, who was to re- quarto 1654.
turn the said Salute by *Guns* also, as was usual
when the *Dutch* and *English Fleet* did meet.

Only in this the *Right* of the *Flag* of *England* differs from that claimed by the *French*, for if there had been a failure on the part of the *Dutch*, of paying that respect to the *French*, the same would have amounted to no more but a breach of the *League*, but the not striking to the *King of England's Flag*, is open *Rebellion*; and the *Article* does so signify, for it is there mentioned as a *Right* and *Sovereignty*, not a bare *Dominion* only, like that of *Jerusalem* to the *King of Spain*. 'Tis very true, the refusing of it is an absolute annulling

of the Treaty; for though in the League with *England* it is mentioned, yet there is nothing of any concession granted by the same, but only recognized there as a Fundamental of the Crown and Dignity of the Kings of *England*; nor was the same ever so much as mentioned in any former Treaty before *Cromwell's* time, as we have already mentioned, but it was always a Clause in the Instructions of the *Admiral* and the Commanders under him. That in case they met with any Ships whatsoever on the *British* Seas that refused to strike Sail at the Command of the King's *Admiral* or his Lieutenants, that then they should repute them as Enemies (without expecting any declared War) and destroy them and their Ships, or otherwise seize and confiscate their Ships and Goods; and these Instructions amongst others continue to this day. The like are given by the *Venetians* to their Captains in reference to the *Adriatick* Sea, and by several other Princes.

XII. The Duty of the *Flag*, that had been so constantly paid to our *Ancestors*, is of such advantage to the continuing the Renown of this Nation, that it serveth to imprint new *Reverence* in *Foreigners* that render it, and adds new Courage to those of our *Seamen* that exact it: And since we know how much it imports a State that it be *reverenced* abroad, and that *Repute* is the principal Support of any *Government*, it equally influenceth the Subjects at *Home* and *Foreign Allies* Abroad. And as there is no Nation in the World more tender of their Honour than the *English*, so none more impatiently tolerate the diminution thereof. With what resentments would not only the more *Generous* and *Noble*, but even the

the *popular* and *vulgar Seamen* detest this or any succeeding Age, should they remit or lose that *Regality*, those Acknowledgments which their Predecessors with so much Glory asserted, and the Neglect whereof was always punished as open *Rebellion*? The indignity of such an Action being sufficient to enflame the whole Kingdom. The consideration of which, besides his Sacred Majesty's own Royal Inclination to the same, and his evident testimonies never to abandon a Ceremony of so high a concernment; witness the exposing the one half of his own heart, his *Royal Highness*, in the asserting the same, with such *Fleets* and in such *Battles*, that no age or time can shew a Memorial of the like; are causes sufficient to create in us new flames of Love to those *Royal Patriots* and Defenders of our *Rights*. *Private Persons* move in another Sphere, and act by other Rules than *Sovereign Powers*; the regard of Credit with them may oftentimes yield to those of utility or other motives; the *Publick* receives little injury thereby, nor is their Wisdom questioned for such punctilio's, if they relinquish them for other emoluments or peace sake; but Sovereigns cannot so transact, their Subjects the People participate in their Honour and indignities; they have a Property, a direct *Right* in the former*; *Sovereigns* cannot alienate or suffer their Honours to be impaired, because it is not really *theirs*, it appertains to the Nation universally,

It is no policy to attempt the change of old Customs and Usages, even errors and abuses are upon such an account legally tolerated. *In omnibus rebus vetustas ipsa plurimum and habet dignita-*

I 3

tis: ita ut Massalienses quorum præstantissima creditur fuisse Respublica, laudentur eo nomine quod gladio ad puniendos fontes usi sint eadem à condita Urbe, quo indicarent in minimis quoque rebus antiquæ consuetudinis momenta servanda. Proxime enim ad Deum accedit Antiquitas, æternitatis quadam indagine. Grot. de Antiq. Reipub. Batav. in Præfat.

* *Vide the Earl of Shaftesbury's Speech to the Parliament, 1672*
Cateri

Cæteris mortalibus in eo stare consilia, quid sibi conducere possent: Principum diversam esse sortem, quibus præcipua rerum ad summam dirigenda. Tacit. Annal. lib. 4. Si fama tua videtur necessaria, rectam muneris tui administrationem non potest condonare. Lessius de Inft. l. 2. c. 11. dub. 24. §. 26.

and they are all effectually injured by such Transactions, either because the indignity really extends *to them*, or because the Government and Authority is thereupon *weakened* and prejudiced, which is the greatest of *Civil detriments* that can befall a People, tho' *ordinarily* they are not aware thereof.

As Prudence doth thus distinguish betwixt the Demeanor of *private* and *publick* Persons, so doth *Charity* itself; for though the *Gospel* precepts do oblige particular Persons to bear Injuries and Contumelies with patience, and to surrender even the *Coat* as well as the *Cloak*; yet is not this so to be construed, as if even private *Christians* were to yield up their *Civil Rights* to every insolent one that would inroach upon, and usurp them, or that they were to *deprive* themselves of those *Reparations*, which the *Law* and *Government* affords them; neither is it so to be understood, as if the *Civil Magistrate* in *Christendom* might not secure himself of that Obedience and Reverence, which is due unto Dignity, but *bear the Sword in vain*.

XIII. This being the *value* which this Nation did always place upon the *Right of the Flag*, the which they never did regard only as a Civility and Respect, but as a principal Testimony of the unquestionable Right of this Nation to the Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour *States* and *Princes of Europe*, and must be paid and acknowledged by

by all *Princes* in the *World*, that shall be, or pass on the same.

The Effects of this *Dominion Universal*, or *Sovereignty* which accrue to a *Prince* are these:

1. Not only the Regality of the fishing for Pearl, Coral, Amber, &c. but likewise the Advantage of all Fish Royal, as Whales, Sturgeon, &c. and not only those, but also the direction and disposal of all other Fish, according, as they shall seem to deserve the regards of the Publick, as in *Spain*, *Portugal*, &c. is used.

Joan. Palatius de Dom. Maris, lib. 1. c. 11. 5 Coke 107.

2. The prescribing of Laws and Rules for Navigation, not only to his own Subjects, but unto others Strangers, whether they be Princes of equal strength and dignity with himself, or any way inferior. Thus the *Romans* did confine the *Carthaginians* to equip out no Fleets; and forbade *Antiochus* to build any more than twelve Ships of War: And if Tradition informs me right, Queen *Elizabeth* interdicted the then *French King* to build any other or more Ships of War than what they then had, without her leave first obtained. The *Athenians* prohibited all *Median* Ships of War to come within their Seas, and prescribed to the *Lacedaemonians* with what manner of Vessels they should sail. All Histories are full of such Precedents, which Princes have enacted, either upon Agreements enforced upon the Conquered, or Capitulations betwixt them and others (their equals or inferiors) for mutual Conveniences.

Grotius de Jure Belli. l. 2. c. 3. §. 15.

3. The Power of imposing Customs, Gabels, and Taxes upon those that navigate in their Seas, or otherwise fish therein; which they do upon several rightful Claims, as protecting them from Pirates, and all other Acts of Hostilities, or assisting them with Lights

Joan. Palatius ubi supra. Julius Paucius de Dom. Maris Adriatici.

13 H. 3 fol.

14. 5 Coke 63.

and Seamarks; for which advantages common Equity obligeth those that reap benefit thereby, to repay it with some acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

4. As it is incumbent on a Prince duly to execute Justice in his Kingdoms by Land, so the Sea being his Territory, it is requisite and a necessary effect of his Dominion, that he cause Justice to be administred in case of Maritime Delinquencies.

5. That in Case any Ships navigate in those Seas, they shall salute his floating Castles, the Ships of War, by *lowering the Topsail, striking the Flag* (those are the most usual Courses) in like manner as they do his Forts upon Land; by which sort of Submissions they are put in remembrance, that they are come into a Territory, wherein they are to own a Sovereign Power and Jurisdiction, and receive Protection from it.

These are the proper Effects of a real and absolute Sovereignty over the Seas; which how they are possessed by the *Venetians*, this ensuing Account will declare.

The Gulph of *Venice* is nothing else but a large Bay or Inlet of the Sea, which entring in betwixt two Lands, and severing them for many Miles continuance, in the end receives a stop or interruption of further Passage by an opposite Shore, which joins both the opposite Shores together: It is called the Gulph of *Venice*, from the City of *Venice*, situate upon certain broken Islands near unto the bottom thereof; it is also called the *Adriatick* Sea, from the ancient City *Adria*, lying not far distant from the former; from the

the Entrance thereof unto the Bottom it contains about six hundred *Italian Miles*, where it is broadest it is an hundred and sixty Miles over, in others but eighty, and in most an hundred. The South-West Shore is bounded with the Provinces of *Puglia* and *Abruzzo* in the Kingdom of *Naples*; the Marquisate of *Ancona* and *Romagnia* in the Pope's State; and the Marquisate of *Trevisana* in the *Venetian* State: The North-part of it, or Bottom, hath *Friuli* for its bounds; the North-East is limited by *Istria*, *Dalmatia*, *Albania*, and *Epirus*; whereof *Istria* doth not so entirely belong to the *Venetians*, but that the Emperor, as Arch-Duke of *Gratz*, doth possess divers Maritime Towns therein; in *Dalmatia*, saving *Zara*, *Spalato* and *Cataro*, they have nothing of importance, the rest belonging to *Ragusa* and the *Turks*; In *Albania* and *Epirus* they possess nothing at all, it being entirely the *Turks*; so that he who shall examine the circuit of the Sea, which must contain about twelve hundred Miles, shall find the Shores of the *Venetian* Signory, not to take up two hundred of them, omitting some scattered Towns and dispersed Islands lying on the *Turkish* side of the *Adriatick* Shore.

For the securing hereof from the depredations of Pirates, and the pretences of divers potent Princes, as the Pope, Emperor, King of *Spain*, and the Great *Turk*, who each of them have large Territories, lying thereupon; also to cause all Ships which navigate the same to go to *Venice*, and there to pay Custom and other Duties, the Republick maintains continually in action a great number of Ships, Gallies, and Galliot; whereto also they add more, as there may be occasion, whereof some

'Tis very true of late by the great Conduct and good Fortune of the Generals *Morofini* and *Coningmarks*, they have now got *Alba Regalis*, and almost the principal parts of the *Morea*.

Baptista Nani
his History of
Venice, lib. II.
fol. 446, 447,
448.

some lie about the bottom of the Gulph in *Istria*, others about the Islands of *Dalmatia*, to clear those parts of Pirates, who have much infested those Seas, and others, and those of most force, have their station in the Island of *Corfu* and *Standia*; in the first of which commonly resides the Captain of the *Gulph*, whose Office is to secure the Navigation of the *Gulph*, not only from the *Corfairs*, but provide, that neither the Gallies or Ships of the Pope or King of *Spain*, nor Great *Turk*, do so much as enter the same, without permission of the Signiory, and upon such conditions as best please them; which they are so careful to effect, that in the Year 1638 the *Turkish* Fleet entering the *Gulph* without Licence, was assailed by the *Venetian* General, who sunk divers of their Vessels, and compelling the rest to fly into *Valona*, he held them there besieged, although the same City and Port whereon it stands, be under the Jurisdiction of the *Grand Signior*; and notwithstanding that a great and dangerous War was likely to ensue thereupon betwixt the *Grand Signior* and the *Republick*, because the *Venetian* General being not content to have chased them into their own Ports, did moreover sink their Vessels, and landing his Men slew divers of their Mariners, who had escaped his fury at Sea; yet after that a very honourable Peace was concluded again betwixt them, wherein amongst other Things it was agreed, That it should be lawful for the *Venetians*, as often as any *Turkish* Vessels did without their license enter the *Gulph*, to seize upon them by force, if they would not otherwise obey: And that it should likewise be lawful for them so to do, within any Haven,

Haven, or under any Fort of the *Grand Signior's*, bordering on any part of the *Venetian Gulph*: So jealous hath this Republick been in all times to permit any to sail the *Gulph*, that in the Year 1630, (as *Palatius* relates) *De Dom. Maris*, l. 2. c. 6. *Mary*, Sister to the King of *Spain*, being espoused to the Emperor's Son *Ferdinand*, King of *Hungary*, the *Spaniards* designed to transport her from *Naples* in a Fleet of their own. The *Venetians* suspected that they had an intention hereby to intrench upon, and privily to undermine, by this specious Precedent, that Dominion of the Sea, which the Signiory had continued inviolate Time out of mind; and that they took this Opportunity when *Venice* was involved with a War abroad, and infested with the Plague at home, and therefore not in a condition to oppose their Progress. The *Spanish* Ambassador acquainted the State, that his Master's Fleet was to convoy the Queen of *Hungary*, being his Sister, from *Naples* to *Trieste*: The Duke replied, That her Majesty should not pass but in the Gallies of the Republick; the *Spaniard* repined thereat, pretending that they were infected with the Plague: The Senate being consulted, came to this Resolution, That the Sister of his Catholick Majesty should not be transported to *Trieste* any other way, than by embarking in the *Venetian* Gallies, according to the usual manner of the *Gulph*; and that, if the Ambassador would acquiesce therein, her Majesty should be attended and used with all that respect and deference which became her Quality: But if she proceeded any other way, the Republick would by force assert her proper Rights, and attack the *Spanish* Navy as if they were declared

Ene-

Enemies, and in hostile manner invaded them. Whereupon the *Spaniard* was compelled to desire the favour of them to transport the Queen in their Gallies, which *Antonio Pisani* did perform with much State and Ceremony; and the Courtesy was acknowledged by solemn Thanks from the Courts of the Emperor, and of Spain.

Selden Mare
Claus. l. 2. c.
24. Fitzherb.
protection, tit.
46.

XIV. The Maritime Dominion by the Laws of England were always accounted the *Four Seas*; such as are born thereon are not *Aliens*, and to be within them is to be within the *Ligeance* of the King and Realm of England.

Seld. ibid. c.
23. Coke 4.
Instit. fol.
142.

The Records in the days of *Edward the Third* and *Henry the Fifth* proclaim it, that those Kings and their Progenitors had ever been *Lords of the Sea*; and amongst those many great Instances of proving the Sovereignty of the same, is that famous Record of *Edward the First* and *Philip the Fair* of France, in which were the *Procurators* of most Nations bordering upon the Sea, throughout Europe, as the *Genoeses*, *Catalonians*, *Almaines*, *Zelanders*, *Hollanders*, *Friezelanders*, *Danes*, and *Norwygians*, besides others under the Dominion of the *Roman German Empire*, where all jointly declare, " That the Kings of England, by right of the said Kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the Sovereign Lordship of the Seas of England; and of the Isles within the same, with power of making and establishing Laws, Statutes, and Prohibitions of Arms, and of Ships otherwise furnished than Merchant-Men use to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all things neces-

1 Ro. Alb. 528.
pl. 2.

necessary for the maintaining of Peace, Right and Equity, among all manner of People, as well of other Dominions as their own, passing through the said Seas, and the Sovereign Guard thereof." *Vide part of the Record.*

By which it plainly appears, That the King of England had then been in peaceable possession of the said *Dominion* by immemorial Prescription, that the Sovereignty belongeth unto them, not because they were *Dominutrusque ripæ*, when they had both England and Normandy, and were Lords of both Shores; (for *Edward the First* at that time had not Normandy) but that it is inseparably appendant and annexed to the Kingdom of England, our Kings being *superiour Lords of the said Seas*, by reason (as the very Record mentions) of the said Kingdom; and since that the Sovereignty of the Sea did always appertain unto the *English King*, not in any other Right than that of the Kingdom of England; no Prince or Republick ought or can doubt the Title by which our present Claim is deduced; 'tis in right of *Britannia*, that the same is challenged, 'twas in that right the *Romans* held it. *And the Case 27 Eliz. in B. R. Sir John Consta- ble's, Leonard, 3 par. 72.* The reason of the opinion there is mistaken; for the right unto the Sea ariseth not from the possession of the shores; for the Sea and Land make distinct Territories, and by the laws of England, the Land is called the Realm, but the Sea the Dominion; and as the loss of one Province doth not infer that the Prince must resign up the rest; so the loss of the Land Territory doth not by Concomitancy argue the loss of the adjacent Seas. It is no more necessary that every Sea Town should command an hundred Miles at Sea, than that each City should command an hundred Miles by Land. *Julius Paucius de Domin. Maris Adriatici.*

The claim justified *Edward the Third* and his *Rose Noble*, though there are other reasons regarding the *Lancastrian Line*, which yield a Colour for the use of *Port-cullis* in the *Royal Banners of England*; yet as in reference to the *Maritime Dominion*, *Henry the Eighth* did embellish his *Navy Royal* therewith, and
Queen

Anno Domini
1600.

Anno Domini
1609.

Anno Domini
1636.

Will. Ful-
beck's Pau-
ders of the
Law of Na-
tions, cap. 4.

The King a-
gainst Sir
John Byron.
Bridgman, fol.
23, 24, 25.

Queen Elizabeth stamped it upon those *Dol-*
lars which she designed for the *East India*
Trade, signifying her power of shutting up
the Seas if she thought fit (as by a *Port-cullis*)
with the *Navy Royal*; this *Dominion* of the
British Seas did authenticate the Proclamation
of King *James*, ordaining the *Flemish* at
London and *Edinburgh* to take Licence to fish:
This justified the like Proclamation by King
Charles I. and warranted by the *Earl of*
Northumberland in his *Naval Expedition*.

That *Prescription* is valid against the *Claims*
of Sovereign Princes cannot be denied, by
any who regard the *Holy Scripture*, *Reason*,
the *practice* and *tranquillity* of the World;
And that true it is, the modern *Dutch* have
pretended, if not dared, to challenge the
Freedom to fish in the *British Seas*, by *Pre-*
scription; but it is likewise as true, that *Pre-*
scription depends not upon the *Corporeal* but
the *Civil Possession*, and that is retained, if
claim be but made so often as to *harr* the
Prescription, the which hath been always
made evident; first by frequent *Modes*, next
by punishing those that refused it as *Rebels*,
by guarding of it, and lastly by giving *Laws*
time out of mind on it; which evidently
proves, that the civil Possession is not re-
linquished; and our Kings constantly claim-
ing the *Dominion* of the same, none else
pretending, all Nations acknowledging it to
be in them, and the same never questioned,
till those modern *Dutch* (of yesterday) arose.

XV. The Importance of the *Dominion*
of the Sea unto this Nation, is very great,
for on that alone depends our *Security*, our
Wealth, our *Glory*; from hence it is, that
England hath a *Right* to all those *Advantages*
and

and Emoluments, which the *Venetian* Republick draws from the *Adriatick* Sea, where the Ships of the *Grand Signior*, of the *Emperor*, King of *Spain*, and *Pope* pay Customs, to maintain those *Fleets*, which give Laws to them within the *Gulph*; 'Tis hereby that the *English* can shut up or open these Seas for Ships or Fleets to pass or repass them; where-to *Queen Elizabeth* had so special a regard, that when the King of *Denmark* and the *Hansatick* Towns solicited her Majesty to permit them free passage, they transporting Corn into *Spain*, she refused them; and when a *Protestant Fleet* of *Hamburgers* and others, had presumed to do so, notwithstanding her prohibition, she caused her *Naval Royal* to seize, take, burn, and spoil them, when they were passed her Maritime Territory, within sight of *Lisbon*; yielding this reason for her justification, That they not only relieved her enemy with provisions, but "had presumptuously made use of her Seas, without obtaining her Royal Permission for so doing:" 'Tis from hence, that the Crown of *England* can justly demand an account of any Ship or Ships occurring in those Seas, what their Business, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without pre-acquainting his Majesty, and obtaining his Royal Permission; without which Dominion and Sovereignty, *England* can never live secure on shore; it being easy for any Foreign Fleets to amuse us with specious pretences, and in their passage to invade and surprize us. Thus while the *Turk* pretended to sail for *Malta*, he occasionally possessed himself of *Canea*, in the Isle of *Can-*

Vide postea in
Cap. of Cu-
stoms.
June 30. An-
no 1598.

Selden, lib. 1.

dia, cap. 11.

dia, and after having tasted the sweet of that place, never forsook it, till he made himself Master of the whole. Many such Precédents do occur in History: And in fear of such Surprizal, the *Atbenians* (being Lords at Sea) did exclude the *Persian* Monarchs from sending any Ships of War into any part of the *Aegean*, *Rhodian*, *Carpathian*, and *Lydian* Seas, and that which tends to the

Alberi Gentil. West, towards Albens; the like caution was Hisp. Advocat. l. 1. c. 14. Vide Mr. Secretary Cook's Letter to Sir Will. Boswell, April 16, 1635.

West, towards *Albens*; the like caution was used by the *Romans* against *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, saving his Vassals, to enter the *Black Sea* or *Pontus Euxinus*, and also the *Red Sea*; and 'tis by virtue and force of this Right, that the *British Nation* can drive on their own Commerce, navigate themselves, and permit others securely to trade with them. 'Tis true, that the *Dutch* have presumed some years since, to violate the security of the *British Seas*, by attacking the Allies of *England*, not only within the *British Seas*, but in her *Harbours*, attempting to pursue a *French* Vessel up almost to *London*, and have more than

* The fight of the *Dutch* with the *Spanish* Fleet in the *Downs*, 1639.

Scilicet hoc factum Hollandorum est contra justitiam omnem pro certo & contra reverentiam quæ partibus & territoriis debetur alienis Alb. Gent.

once * attacked the *Spanish* Fleets in her Roads, under the protection of her Castles, and that against the *Laws of Nations*, and the *Peace of Ports*, in which for the time they seemed to cloud the *Honour* of the *Nation*; but satisfaction for Indignities of that nature, though slow, yet are sure, and should such as those have been longer tolerated, beloved *Britannia* must become a prostitute, by a confederation of those *States*, or take *Pass-ports* for her Commerce; but the *Royal Martyr's* Goodness was no longer to be trod on, his Heart and his Cause were good, and though those unhappy Times (which were crooked

to

to whatsoever seemed straight) did hinder the accomplishment of his entire intention for Satisfaction; yet those whom the just God of Heaven was pleased for a time to permit as a punishment to this Nation to rule, did not want in the fulfilling; for so soon as he was pleased to stay the fury of the Intestine Sword, their Hearts took fire from those flames that had formerly been kindled in that Royal Breast, and having prepared a Fleet, in order to the treating as Soldiers with Swords in their Hands, they were in the like manner assaulted in their Territories in the Downs (but the Dutch found then what it was (tho' two for one) to assault a British Lion at the mouth of his Den) intending, if possible, to have destroyed the English Power, but were frustrated in their design, being severely beaten home to their own doors; and afterwards those that then had got the English Sword in their hands, begun to consider that the Victory must be pursued as a season fit to assert their Antient Right and Sovereignty of the Sea, and then those People thinking that the odds before was not enough to destroy the British Fleet, they equipt out a Fleet greater and far more numerous than the English, under the Admirals, Van Trump, De Wit, the two Evertsons and Ruyter; but they suffered the same Fate as their former, about June 2 and 3. some thirty four of their Ships on the coast of Flanders, burnt and taken, and the rest chased home to their Ports; and not long after followed the total defeat of their Naval Forces, accompanied with the death of Van Trump by the English, under the Admirals, Blake and Monk, who had sunk and fired about thirty more of their Ships of War (no

Hisp. Advocat. lib. 1. cap. 14.

Anno Domini 1552.

June 2 and 3.

About the 8th of Aug. 1653.

quarter being given till the end of the Battle) six *Captains* and about a thousand *Men* were taken Prisoners, and about six thousand slain. Of their *Presumptions* since (amongst other things) in denying the Duty of the *Flag*, and what punishment and check they have had for the same, to what condition they have been reduced, and made to acknowledge *that Dominion and Superiarity* to that Crown (under which their *Ancestors* humbly * besought the acceptance of the *Sovereignty* of the *Netherlands*, might be annexed and protected) is now fresh in our memories; so high and of so great Importance is this *Dominion and Sovereignty* signified by the *Duty of the Flag in the British circumjacent Seas*.

* Offered to
Queen Eliz.

Cette cy entre
autres merite
bien une confi-
eration specie-
ale, Que la con-
junction desdits

*Pays de Hollande, Zelande, Friens, & des Villes de l'Escluz, & Ouden-
de en Flanders, avec les Royaumes de vostre Majesté, emporte & fait
l'Empire de la Grande Mer Oceane; & par consequent une assurance &
Felicité perpetuelle pour les Subjects de vostre Serenissime Majesté.
John Stoupe's Supplement to Hollinshed, An. Dom. 1585. Vide Sir
Walter Raleigh, lib. 5. cap. 2. §. 2. & 3.*

C H A P. VI.

Of the Right of Pressing or Seizing of Ships or Mariners for Publick Service.

- I. *That such Right is excepted in the Law of Dominion.*
- II. *Whether the Ships of Nations who are in War at the same time, may be pressed, the danger being equal.*
- III. *Whether this Right extends to Ships to fight, and no more, or gives a Power to trade.*
- IV. *By the Laws of England the King may seize.*
- V. *The reason why such a power was vested in the Admiral.*
- VI. *That such a Right of compelling Men to serve in Naval Expeditions may be.*
- VII. *Objections legal-refuted.*
- VIII. *Of the antient punishment of deserters of the King's service.*
- IX. *Concerning the several Statutes now in force touching Mariners and Soldiers.*
- X. *Whether it be lawful for a private Man to execute Justice on such as fly and desert the service.*
- XI. *Where a general Commission is given to Men to execute Justice.*
- XII. *Several Cases touching the Admiralty and their Jurisdiction. Ships or Boats found at Sea, Royal Fish and Deodands belong to the Admiralty.*

I. **T**HE Civil Law, though it can command nothing which the Law of Nature forbids, nor forbid what it commands; nevertheless it may circumscribe natural Liberty, and prohibit what was naturally lawful; and also by its force *antever*t that very Dominion, which is naturally to be acquired. Hence it is that Princes, by the Law of Nations, may acquire a Right of use of things

Enta, aut
malo aut ne-
cessario faci-
nore retenta.
Liv. lib. 24.

† F. de Navi-
bus non excus.
C. l. 11. tit. 3.
and Perkins on
the same Law.

that do belong to private Persons; for property hath not (as hath been said) swallowed up all that *Rights*, which rose from the common state of things; because as all Laws are to be construed as near as possible to the intention of the Makers, so we must consider what was the mind of those that first introduced singular Dominions: Now the Rules to construe that must be near as possible to natural equity, and that in extreme necessity that old right of using things should revive, as if the things had remained common, the same standing with the Interest of all human Constitutions; and therefore in the Law of Dominion extreme Necessity seems excepted. Hence it is, that the Vessels and Ships of what nature and nation soever † that should be found riding in the Ports or Havens of any Prince or State, may be seized on, and employed upon any service of that Sovereign that shall seize the same, being but a harmless utility, not divesting the Owners of their Interest or Property.

Quidni enim
(inquit Cice-
ro) quando
sine detrimento
suo potest, al-
teri communi-
cet, in iis quæ
sunt accipienti
utilia, danti
non molesta?
1. de Offic. 1.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*; now the Possessor is here pressed with an equal necessity, and by the same argument is rather obliged to the defence of his own Country than another, whether by the Law of Nations the Ship ought to be detained, hath been doubted; most certain it may. Who would not pluck a shipwrackt Man from his plank, or a wounded Man from his Horse, rather than suffer himself to perish? To slight which is a sin, and to preserve the highest of Wisdom; besides, in the taking of

of the Vessel the right is not taken from the Owner, but only the use, which when the necessity is over, there is a condition of restoring annexed tacitly to such a seizure.

And doubtless the same Right remains to seize the *Ships of War* of any Nations, as well as those of private interest, the which may be employed as occasion shall present: So the *Grecians* seized * on Ships of all Nations that were in Ports, by the advice of *Xenophon*, but in the time provided food and wages to the Mariners.

III. Whether this Right extends so far as to give Princes a Power to seize in order to traffick may be some question; certainly if the Traffick may be for such Commodities, as Mafts, Timber, Tar, Powder, Shot, or other Commodities or Accoutrements of Arms, or Naval Provisions of offence necessary for the defence of the Realm, it may be done (but then it is just *freight* should be paid) for what hurt can it do me to let another have my Boat to pass over the Ford, if he rewards me? And if that be answered, the Owners are at no prejudice, for this is but a harmless utility.

IV. By the Laws of *England* there is no question, but the King may seize, and it appears by very many antient Records, that he might do it, and it was one of the Articles of Enquiry amongst others; "Item, soit enquis de Nefs, que sont arrestees pour le service du Roy, ou pour autre raisonnable cause per les Officers du Roy, ou de l'Admiral, et debri-sent l'Arrest, et par les quelles avandictes Nefs sont emmenez, et retamer les Mariners qui sont ordonnez pour le service du Roy; et si retracent, et en cas que homme soit endite

qui la debruse l'Arrest en sa Nef arrestee pour le service du Roy, et de ce soit convicte par xii. il perdra sa Nef si'l na grace du Roy ou du hault Admiral, et pour ce quil a este plusieurs fois debatu en Angleterre pour les arrestes des Nefs, quant le Roy amande Sergeants d'Arms, ou autre Ministres pour arrester Nefs al oepe du Roy, et les Seigneurs des Nefs sont venus devant l'Admiral, et alleguent que leurs Nefs nestoient mye arrestees, ordonne estoit au temps du Roy *Richard le Premier a Grimby* per advis de plusieurs Seigneurs du Royalme, que quant Nefs seront arrestees pour service du Roy, que le Roy escripta par ses Lettres Patentes a l'Admiral d'arrester les Nefs plus ou moins a la voulonte du Roy, et selon ce quil a besoin, et l'Admiral escripta au Roy ou au Chancelier d'Angleterre les Noms des Nefs ainsi arrestees assemblement avec les noms des Seigneurs et Maistres d'icelles, et en tel cas le Seigneur de la Nef ne la Maistre ne viendront pas a dire que la Nef nestoit mye arrestee ne a ce ne seront oyz," and that upon such Arrests broken, the Parties might be punished and fined.

De Offic. Admir. Angliae per Roughton, Artic. 10.

Again, *Inquiratur si arrestatus, ad serviendum Regi fregit arrestum, bujusmodi transgressor stat in gratia Regia sive Admiralli sui utrum voluerint committere Carceribus mancipandum vel finem facere, in hac parte si arrestum bujusmodi factum manifestum fuerit cognitum.*

The Black-Book of the Admiralty, fol. 28, 29. & 157, 158. 15 R. 2. c. 3.

If the *Admiral* by the King's Command arrests any Ships for the King's Service, and he or his Lieutenant return and certify the Arrest, or a List of the Ships arrested into *Chancery*, no Master or Owner of the Ships so arrested shall be received to plead against the Return, "pur ceo que l'Admiral et son Lieutenant sont de Record." Item,

Item, *Inquirendum de omnibus Navibus quæ ad serviendum Domino Regi super mari arrestatæ fuerint, & postea Domini, possessores, sive Magistri dolo & fraude à servitio hujusmodi se subtraxerunt in deceptionem Domini Regis, qui si inde postea indictati fuerint, & convicti super hoc, naves suæ Domino Regi forisfactæ per ordinationem Domini Regis Richardi Primi; & si Domini, Possessores, vel Magistri hujusmodi inde coram Domino Rege & Cancellario suo per aliquas allegationes se aut naves hujusmodi excusare voluerint, si Admirallus vel locum tenentes sui per Literas suas Patentes de arresto hujusmodi factæ fidem fecerint pleniorē, Domini, Possessores, aut Magistri prædicti nullo modo audiri debeant, seu eis fides quovis modo adhiberi, eo quod Admirallus & locum tenentes sui sunt de recordo.*

And if the Ship so arrested break the Arrest, and the Master or Owner thereof be indicted *Croke's Arg.* and convicted, *devant l'Admiral*, by the *in Hampden's Case, fol. 79. to 100.* Oath of twelve men, the Ship shall be confiscate to the King, which power the *General* maintains in all places where he has power, *Vide State Trials, Vol. I.* and the same seems to be provided for in the latter Clause of 15 R. 2. Ca. 3.

IV. By King *Estelred*, his Bishops and Nobles in the General Council of *Eubam*, Anno *Spelmanni* 1009, for the setting out a Fleet every Year, *Concil. 520.* and the punishment of those who hurt or *521.* spoiled any Ship, or deserted the Service, especially if the King was present in the Expedition, amongst others it was enacted, *Si quis Navem in Reipub. Expeditionem designatam vitiaverit, damnum integre restituito & Pacem Regis violatam compensato; si vero ita prorsus corruperit, ut deinceps nibili habeatur, plenam luito injuriam & lèsam præterea Majestatem.* So Sir Henry Spelman's Version out of the Saxon

Copy renders it, but the antient Copy hath it more largely.

Spelman. 528.
expeditio Na-
ualis.

Naves per singulos annos ob patriæ defensionem & munitionem præparentur, postque Sacrosanctum Pascha cum cunctis utensilibus competentibus simul congregentur; qua igitur etiam pana digni sunt, qui Navium detrimentum in aliquibus perficiunt? Notum esse cupimus, quicumque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit; & tamen recuperabilis sit; is Navis corruptelam vel fracturam ejusdem per solidam prius recuperit, Regique deinde, ea quæ pro ejusdem munitionis fractura sibiimet pertinent, rite persolvat.

Rot. Scotia
10. E. 3. m.
2. to 17. and
then to 34.
intus & dors.
to 28.

Most certain it is, that the Kings of England have in all Ages, by their *Writs* and *Patents*, commanded not only the *Admiral*, but the *Wardens* of the *Cinque-Ports* and others, to arrest and provide Ships of War, and other Vessels, and impress and provide Masters of Ships, Seamen, Mariners, and all other necessary Tackle, Arms, and Provisions for Ships, for the defence of the Sea and the Realm against foreign Enemies, or for transporting of Armies paying their Freight (if not bound thereto by tenure) as well as to elect and provide all sorts of Soldiers, Carpenters, and other Officers, to be assistants in their several Expeditions.

1 Eliz. cap.
13. Vide 16.
17. Car. 1.
c. 5.

But Fishermen or Mariners pressed for the Service, are not to be employed as Soldiers, but only as Mariners; unless it be in cases of great necessity, or bound thereunto by Tenure, Custom, or Covenant.

Court of Admiralty erected by Ed. 3.

V. The reason why the *Admirals* had such power given them, was because they being sometimes called *Capitanei*, and *Gubernatores Flotarum*, they had the ordering and governing

ing of the Ships of War, and the raising and fitting up such Ships for the Navies, as they thought fit; other times called *Custodes Maritimarum partium*, their duty being to provide all Naval Provisions, as well to supply the King's Navies occasions, as to gratify any other of the King's Friends, when distress should constrain them to touch in his Ports, that his Subjects might receive the like retaliation again; they were called *Capitanei Navitarum & Marinellorum*, as in reference to the deciding all differences amongst those in the King's Service, and punishing of such as transgressed; and as the place was great, so the power was large, especially in all things belonging to the *Navy-Royal*, in which they had the supreme rule and government in all things belonging to it. He sat formerly in the King's House, and there kept his Court, as the *French Admirals* do at this day at the *Marble-Table*, in the King's House at *Paris*.

Spelman's
Gloss. in tit.
Admir.
Lambert Ar-
cheion tit. Ad-
miral.

VI. And altho' there seems no question but the King may press Ships, yet there have been those who seem to doubt, if not to question, whether he may press Men to serve; for my own part I think he may, my Reasons are these: It is lawful for every Man to addict and yield up himself to whom he pleaseth, as appears both out of the *Hebrew Law* and *Roman Law*; why then may not any People, being at their own dispose, give up themselves to their Prince or Sovereign, so as to transfer the right of commanding their aid and help, as often as need shall require (it is not here enquired what may be presumed in a doubtful case, but what may be done in point of right) most certain such a power may well be, and that grounded on great Reason; as

Exodus xxi. 6.
Inst. de Jure
person. § Servi
autem.
Gell. l. 2. c. 7.

if

if the Commonwealth should happen to be invaded by such a one as seeks not only the subversion of the Government, but the destruction of the People, and they can find no other way to preserve themselves, but that the supreme Power should be vested with such a Prerogative, as to enforce or press the Inhabitants to serve in Arms in the Defence of the same, and the contempt of which to punish; or if they should be oppressed with want, and that supplies of Provisions can no ways be had, but by compelling another by force, to exhibit the common Offices of humanity to a Nation in whose Territories a Famine rages, that the Inhabitants should on such extraordinary Occasions be compelled by force to serve in Arms.

And this Dominion may be obtained several ways, either by a voluntary Resignation to a Conqueror, as they of *Capua* to the *Romans*, *Our Land, the Temples of our Gods, all Divine and Humane things we yield up unto your hands, O ye conscript Fathers*. Again, Freedom may be granted to all by a Conqueror, except Mariners, which should in Cases of necessity be excepted; or that some Prince, who will not suffer any Mariner to go out of his Dominions, without subjecting themselves to such a reasonable command, besides the Majority of Nations on such grounds may abdicate from a part of them the entire Freedom of that Member.

Tacitus.

2 *Inst.* 358.

Nor are there examples of this kind wanting; the *Germans* are every one Master of his own House, but are almost on every occasion subject to their *Lords*, especially in their Goods. The *Irish Cosherers*, which were re-
prendinations, when the *Chief Lord* and his
Retinue

Retinue came to his Tenant's House, they fed upon his Provisions till they were spent, all being solely at their Devotion, And as to the Sea, the King of *Britain* may at this day restrain Merchants or Mariners to pass out of the Realm, without Licence; and the various tenures that are introduced, which is presumed were since the *Conquest*, were no other but the Will of the *Conqueror*; for the right is not measured by the excellency of this or that form, but by the Will.

As to the impressing of Seamen, it is strange that its Lawfulness should ever be called in Question, by any Person who has read our History or our Statute-Book. The Crown has been in possession of it from Time immemorial: And if a new Race of People were this Day to spring out of the Earth to possess this Island; if we may at the same Time suppose them to unite under one Civil Polity, and to be conscious of the Necessity of naval Strength for their Defence; the Power of impressing them for the Sea-Service would be implied in the executive Part of their Government, let it's Constitution be what it might, viz. limited Monarchy, Aristocracy, or Democracy, or any compound of them, or some of them. But, as was hinted above, our Legislature has frequently maintained this Power as undoubted Law. See 2 *Ann. ch. 6.* concerning Protections to be granted to Apprentices to be bound to the Sea-Service. But more explicit is a former Statute, viz. 2 and 3 *P. & M. ch. 16.* by which Watermen on the *Tbames*, who abscond in Pressing-Time, and then return to row, are made liable to Imprisonment for two Weeks, and to be banished to row upon the River by the Space of

2 *E. 1. Memb.*
18. *Rott Patt.*
2 *E. 1. m. 17.*
Rot. fin. 31.
E. 1. num.
44. *Ro. Pat.*
17. *H. 6. Ro.*
Cl. in dorf.
Vide the Case
of Bates, in
Lane Rep. 4.
Vide supra Sec.
4. *ad finem.*

See *Foss. Cr.*
Law. 154.
Clar. Hist.
Rebel. Vol. I.
B. 4. p. 257.
325. Fol.
Edit. Observ.
on Stat. 271.
2d. Edit.
Clarend.
Contin. P.
341.

of a Year and a Day. See also 2 R. 2. *cb.* 4. and 5 *Eliz. cb.* 5. *sect.* 41, 43.

VII. And though it hath been conceived by some, that the King cannot press Men to serve in his Wars, giving their Reason, that of old he was to be served either by those that held by tenure, those that covenanted by Indenture to provide Men, or those who contracted with the King's Officers for Wages and entered into Pay, or those that were in Prison for the King's Debts; but that only extended to those Wars that were by Land; not one word in all those Acts, or Muster *Rolls*, relating in the least to Mariners; and yet what vast Fleets were in those Days? But on the other Hand it hath been always accustomed to press such sort of Men for the Naval Expeditions. The ancient Records that mention such Persons subject to be pressed by Law is that of 29 *E.* 3. commonly called * *The Inquisition of Queenborough*, wherein it was expressly in charge amongst others, to enquire of those Mariners that were pressed for the King's Service, and deserted the same: So likewise by those other Articles translated by *Roughton*, it is in express charge to the *Jury*, to present those that being prest to serve brake the King's Arrest, in order to their Punishment; and in those days it was esteemed an high offence; and the Oath which the *Jury* then took being impanelled, was this:

* 2. *Apr.* 49
E. 3. in the
Black-Book
of the *Admiralty*, 32, 33,
34. *Art.* and
fol. 62. *Art.*
10.

“ This here see my Lord the Admiral, that I *Jonathan Nash* shall well and truly enquire for our Lord the King, and well and truly at this time then serve at this Court of the Admiralty, present as moch, as I have acknowledge, or may have by Information of eny of my Fellows, of all maner Articles or Circumstances

stances that touchen the Court of the Admirate and Law of the Sea, the which shall be grate to me at this time, and thereupon sworn or charged, and of all other that may renew in my mind, and in shall for nothing lette, that is for to say, for Franchise, Lordship, Kinreden, Allience, Friendship, Love, Hatred, Envy, Enemitee, for dred of lost of Goodnee, for non other case that I shall see The Black doe, the King's Counseils, my fellows, mine Book of the own, will and truly hele without fraud or Admiralty, malengyn, so God me help at the holy dome, fol. 17. and by this Book."

VIII. And as the enquiry was strict, so was Lamb. inter the punishment very great: *Item, qui fugiet Leg. Edvardi à Domino vel socio suo pro timiditate belli vel 139. mortis in conductione Heretochii sui in expedi- 13 Car. 2. cap. 9. Ar. 17. tione navali vel terrestri, perdat omne quod suum est, & suam ipsius vitam, manus mittat Dominus ad terram quam ei antea dederat.* 101 V1572

IX. In the Service of the King two sorts of persons were always capacitated to attend the Naval Royal in their Expeditions, the one a Salt-water Land-Soldier, the other a compleat Mariner or Sailor: It was a doubt, whether such a Soldier, departing from the Service, were subject to any other punishment than that of *Martial Law*, which can at no time be executed in England, but when the King's Standard is in the Field; thereupon it was provided, *That if any Soldier being no Cap- 7 H. 7 cap. 1. tain immediately retained with the King, which §. 2. shall be in wages and retained, or take any prest Cro. Car. 71. to serve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's service without licence of his Captain, that such departing be taken, deemed, and adjudged Felony. And that all the Justices in every Shire of England, 3 H. 8. cap. 5. §. 2. where*

where any such Offender be taken, have power to enquire of the said offences, and the same to hear and determine as they do and may do of Felony, &c. expressed in the King's Commission to them made, as though the same offences were done in the same Shire. And also that the departing of such Soldiers, and also their Retainers, if it be traversed, be tried in the same Shire where they are for such a Cause arrested and arraigned. The Justices have here a concurrent power to enquire and try, but it does not shut out the Sovereign Courts, or hinder but the King may try them upon a Commission of Oyer and Terminer, or Goal-delivery. It was a doubt conceived by some of the late Judges, if a Man had run from his Colours at *Plymouth*, and afterwards was taken in *Middlesex*, and committed to *Newgate*, whether after a Bill is found in *Middlesex*, the Justices of Goal-delivery for *Newgate* could try him; but it was ruled more than once by the greater number of the Judges, they might; and so have the Precedents been always since the making of this Statute, and upon the like Reason, that a Man that takes a second Wife, hath by the Statute the same directions to be tried in the same Shire where he is taken; yet if taken in *Middlesex*, was always tried at the *Old-Baily* in *London*.

These Statutes were made, because the Statute of 18 *H. 6. cap. 19.* was looked upon not to be sufficient, for that Act had reference only to the ancient Tenures, and those that covenanted with the King to provide Soldiers; whereupon a question afterwards arising, whether several who having then taken prest Money to serve the *Queen* against the Rebels in *Ireland*, and had departed and withdrawn themselves

themselves from the Service, should be within those Statutes, in regard some doubt seemed to arise on the same, but it was resolved by *6 Coke, 27.* all the Judges of *England*, that those two Statutes of 7 H. 7. Cap. 1. and 3 H. 8. Cap. 5. are all one in effect, and were perpetual Acts: The great doubt and question, *Rassal doubt- ed in his A-bridgment.* whether the Statute of 18 H. 6. Cap. 19. did extend to Mariners and Gunners serving on the Seas, and taking Wages of the King, was in Parliament not long before cleared in these Words: *That the said Statute made in the eighteenth Year of the Reign of H. 6. in all pains, forfeitures, and other things, did, doth, and hereafter shall extend as well to all and every Mariner and Gunner, having taken, or who hereafter shall take prest or wages to serve the Queen's Majesty, her Heirs and Successors, to all intents and purposes, as the same did, or doth unto Soldiers, any diversities of opinion, doubt, matter, or thing to the contrary thereof notwithstanding:* But now Mariners deserting the Sea-service are particularly within the Provision of 13 Car. 2. Cap. 9. *Article 17.* which hath made the Offence Death; but the Trial is by a *Court Martial*.

And Land-Soldiers, though in Time of Peace, are likewise within the Statute of 7 Hen. 7. Cap. 1. and 3 Hen. 8. Cap. 5. if they take any prest Money to serve the King upon the Sea, or upon the Land, or beyond the Sea, and shall desert the Service, but that is inquirable according to the Course of the *Common-Law*, where if the party shall depart without Licence, he shall suffer Death, without benefit of the Clergy.

X. If such Persons shall so desert the Service, it hath been a Question, whether a private Person, *Non solis ducibus aliisque potentibus Inna-*

*sci solet, atque
immorari bene
agendi propoſi-
tum, ſed cuique
volenti & licet
& honeſtum eſt
ejus qua vivit
Reipublicæ
malis commo-
veri, & publi-
cas utilitates
pro ſuis viribus
promovere.*

Vide Grotium

l. 2. c. 10.

* That is as to
entitle him to
Clergy, and ſo
it was ruled
by all the
Judges in *B.
R. M. 23 Car.
2.* in the Caſe

Perſon, under the ſame obedience meeting
with ſuch a Deſerter, might not put him to
death; it hath been conceived that he might,
and the act is lawful, and the party that ſlays
him hath a true Right before God, as impu-
nity before Men: But that is to be under-
ſtood partly by the Words, and partly by the
Letter of the Law: For if the Law gives in-
dulgence to Paſſion, it takes away human Pu-
niſhment, and not the Fault; as in caſe an
Huſband kills an Adulterous Wife or the
Adulterer * in the Act; moſt certain it is a
Provocation in the higheſt nature, and will
juſtify the ſlayer: But if the Law reſpect the
Danger of future Evil, by delay of Punish-
ment, it is conceived to grant right and pub-
lick power to a private Man; ſo that he is
not then in the capacity of a private Man.

of one *Manning*, found ſpecially at *Surrey Affizes* before Mr. Juſtice
Twiſden, who ſlew the Adulterer in the very Act. *Ventr. 158, 159.
Kel. 137. pl. 4. T. Raym. 312. 2 Keb. Rep. 829. pl. 49. Feſt. Cr.
Law, 296. Hawk. Pl. Cr. 82. pl. 36. Vide Auguſt, de Civit. Dei
citatum. C. quicunque cauſa. 23. qu. 8.*

An. 25 Eliz.

Co. Litt. 74. b.

And upon that very Reaſon Queen *Eliza-
beth* denied the conſtituting of a *Conſtable*, for
the Trial of Sir *Francis Drake*, who ſtruck
off the Head of *Doughty*, in *partibus trans-
marinis*.

XI. Hence it is, that every Man hath a Li-
cence given him to oppoſe force againſt plun-
dering, and pillaging Soldiers: And the next
the ſubſequent Law about Deſerters ſaith,
*Let all men know they have a power given them
againſt publick Robbers and Deſerters that run
from their Colours, and all are Miniſters of Re-
venge, for the quiet of all; to this purpoſe is
that of Tertullian, againſt Traytors or publick
Enemies every Man is a Soldier: And here indif-
fers*

*Cod. Juſtin.
tit. quando li-
ceat unicuique.*

fers the right of killing of Exiles and Outlaws, or those whom they call *Banditoes*, from those kind of Laws; because there proceeds a special Sentence, the Judgment of Banishment or Outlawry being promulgated; but here a general Edict, the Fact being evident, obtains the force of a Judgment or Sentence pronounced; the Judgment of the latter must be according to the *Civil Law*, which yet remains still in force, as to the Trial of such Deserters; which Impunity for such killing seems allowed of at this day by that Law.

It was in force in *England* till the beginning of the Reign of *Ed. 3.*
Co. Litt. 128. b. 12 H. 4. f. 4. 5. 37 H. 6. fol. 3. Mir. c. 4. §. 4.

XII. Cases relating to the Jurisdiction of the Admiralty as to Matters sueable there, or at the Common Law.

The Trial shall be where the Original Contract is made, which if in *England*, tho' the sublequent Matter to be done be upon the Sea, the Trial shall be at the *Common Law*.

Trial where the Original Contract arises.

But if the Contract, and what is to be done all of it is beyond Sea, it cannot be tried at Law here, but in the *Admiralty*; but if part be to be done here and part beyond Sea, so as it is mixed, then it shall be tried at Law. As an Action upon the Case upon a Policy of Assurance made at *London*, that a Ship shall sail from *Melcomb Regis* in the County of *Dorset* to *Abville*, in *France*, safely, &c. And the Plaintiff declared, that the Ship in sailing towards *Abville*, viz. in the River of *Soame* in *France*, was arrested by the King of *France*; &c. and the Issue was, whether the Ship was so arrested or not; the Trial was by *Nisi Prius* in *London*, and resolved to be well brought, tho' 'twas objected, that this Issue arising merely from a Place out of the Realm, could not be tried at Law, for the Assumpsit being at *London* was the ground and foundation of the

Action, and therefore shall be tried here, for otherwise it could not be tried at all. Cited in *Dowdale's Case*, 6 Rep. 47. b. *Godbolt* 76. and 204.

And so if the Contract be made at Land, tho' beyond Sea, the Trial shall be at Law, tho' what is to be done, be all of it beyond Sea, by laying the Contract made at a Place in *England*, as in *Bourdeaux apud Islington in Com. Middlesex*. So is the Case of *Slaney* and *Clobery* against *Cotton*, where the Plaintiff sued the Defendant in the *Admiralty* Court upon a Promise made in *Barbary*, to sail from *Sirborona* in *Barbary* to *Ricumpta* in *Brazil*, &c. upon suggestion that the Contract was made in *London*; Prohibition was granted: For, by *Jones*, the performance of the consideration does not give the Action without the Contract, and this was made at Land, tho' beyond the Seas, which may be supposed to be done in a place in *England*. 2 *Rolls Rep.* 486. See *Tucker* and *Cass's Case* in the same Book 492, and 497, and 2 *Brow.* 10, 11.

Matters beyond Sea not triable in an inferior Court

A Contract was made at *Newcastle*, that a Ship should sail from *Yarmouth* to *Amsterdam*, Debt was brought upon this Contract, in the Court of *Newcastle*; adjudged, that the Action would not lie there, being a limited Jurisdiction, which shall not have consue of any matters done in *partibus transmarinis*, but only the Courts at *Westminster*, *March's Rep.* 3.

Premunire for suing in the Admiralty.

If one Libel in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libel, that the thing was done upon the Land, and they notwithstanding that hold Plea of it, a *Premunire* lyeth upon it; but if the same do not appear within the Libel, then it is not within the 13 of R. 2. c. 5. and

15 of R. 2. c. 3. but a Prohibition shall only issue, 2 Leon 183.

The Admiralty hath Jurisdiction of *Flotzam*. *Trespass* against Jones, 2 Keble 361.

A Dutch Ship was broken by a great Tempest in a Creek of the Sea, *Infra Corpus Comitatus de Dorset*; the Sailors upon pretence that the Goods in the Ship were *bona peritura*, procured a Commission of Sale out of the Admiralty-Court to sell them; and the true Owners to prevent such Sale, brought a *Superfedeas*; and upon shewing the Libel to the Court, a Prohibition was granted. (1.) Because the Cause of Action accrued *infra Corpus Comitatus*. (2.) Because the Sale of the Goods was good, as *bona peritura*. *Culmer* against *Brand*. 2 Sid. 81.

One having taken a Ship as Prize, which had *bona peritura*, entered into a Recognizance with sureties before the Judges delegate, to bring the Money raised by Sale of the Goods in the Admiralty-Court before such a day, if they upon a Plaint there depending did not adjudge the Ship and Goods to be lawful Prize, which they adjudged lawful Prize; and after at another time cited the Owner before the Judges of the Admiralty, and for his not coming and bringing the Money at the day, they threatened to sue Execution against the Bail or Sureties who were Merchants of London; Prohibition was prayed; for by their first Judgment or Sentence, their Recognizance was discharged, and they ought not by Colour of this to endanger the Credit of Men of Reputation; but the Court would not grant a Prohibition, for they said, an unjust Sentence of the Admiralty, in a cause of which they have original Conusance, is not

Admiralty hath Jurisdiction of *Flotzam*. *Superfedeas* to the Admiralty.

Unjust Sentence in the Admiralty where they have original Conusance is no Cause for a Prohibition,

2 Sid. 152.
Beck, v. Gbelycke.

a Cause of Prohibition. As if Tithes which in verity are paid, are found not paid in the Spiritual Court, yet a Prohibition lies not, and here the Judges Delegate have sole Power upon this Recognizance, to make Execution or defeat it.

Suit there for
not ballasting
a Ship.

2 Brownl. 13

The Corporation of *Trinity-House*, under pretence of Letters Patents from Queen *Elizabeth*, for the ballasting of all Ships within the Bridge of *London* and the Sea, and that no Ship should take Ballast of any other but of them, sued one *Boreman* (a *Dutch Man*) in the Admiralty for taking Ballast of another, within the Place aforesaid. *Per Curiam* the Place being alledged to be at *Ratcliffe*, a Prohibition was granted; resolved that the Letters Patents were void, for that thereby a Charge is raised upon the subject for the private gain of the House, for they would not ballast a Ship under 2 d. *per Ton*.

13 Co. 54.

In the Case of Sir *Richard Hawkins*, Vice-Admiral of the County of *Devon*, who was prosecuted in the *Star-Chamber*, for abetting and comforting *Hull*, and other notorious Pirates. It was there resolved, that by the Common Law the Admirals ought not to meddle with anything done within the Realm, but only with things done upon the Sea; and also by the Statute of 13 R. 2. St. 1. c. 5. 2 H. 4. c. 11.

It was likewise resolved, that the said Statutes are to be intended to hold Plea, and not of a power to award Execution; for the Judge of the Admiralty, notwithstanding these Statutes, may do execution within the Body of the County.

13 Co. 53.

The Court of Admiralty is not a Court of Record, because they proceed there according to the *Civil Law*.

Where

Where one admits the Jurisdiction of the *Admiralty* by pleading there; no Prohibition shall be granted. *Jennings* against *Audley*, 2 *Brow.* 30. 12 *Rep.* 77. Therefore on Motion for a Prohibition in a Suit for Seamen's Wages, there the Suggestion was, that the Court below refused to allow the Defendant's Allegation; that the Place where the Plaintiffs entitled themselves, was not a Port of Delivery: This is no Foundation for a Prohibition; if any thing it must be an Appeal.

Lord Raymond, 247.

Craddock bought divers Things within the Body of the County, which concerned the furnishing a Ship, as Cordage, &c. the Vendor sued him in the *Admiralty* Court; a Prohibition was granted, 2 *Brow.* 37. *Craddock's* Case, *Owen* 122. 3 *Keble* 552. *Merryweather* against *Mountford*.

Suit there for Contract upon Land Prohibition.

Note, No Appeal from the *Admiralty* before a Definitive Sentence. Lord Raymond, 1248.

The Defendant being Master of a Ship of which the Plaintiff was Owner, the Ship was taken by Pirates upon the Sea, and to redeem himself and the Ship, he contracted with the Pirate to pay him 50 *l.* and pawned his Person for it; the Pirate carried him to the Isle of *Scilly*, and there he paid it with Money borrowed, and gave Bond for the Money at his Return; after the Redemption both of the Ship and himself, he sued in the *Admiralty* for the 50 *l.* and had a Sentence for it, and thereupon a Prohibition to the *Admiralty* was prayed but denied, because the Original Cause began upon the Sea, and whatever followed was but accessory and consequential. *Hard.* 183. Prohibition was granted to the *Admiralty* Court on the 22d and 23d *Ca.* 2.

1. *Lev.* 243.

Yelv 135. 173.

1 *Sid.* 320.

2 *Sarr.* 260.

2 *Lev.* 25.

1 *Ven.* 173.

308.

1 *Sid.* 367.

Cra. Eliz.

685.

cap. 26. *Seiz.* 11. in Suit there for the Forfeiture of a Ship on selling Wares in *Ireland* without breaking Bulk, being put into *Ireland* from *America*, by contrary Winds, this being triable in the Plantations or any Court of Record in *Westminster*. *Pidgeon con. Trent*, 3 *Keble* 640, 647, 651. (*Vide Librum.*)

A Master of a Ship agreed with certain Merchants concerning a Voyage, and received Orders from them to lay in Provisions of Meat and Drink, and to provide Mariners, &c. and after the Voyage was finished, the Merchants refused to pay the Master of the Ship what they had agreed for, upon which he libelled against them in the *Admiralty*; Prohibition was granted upon the Statute of 2 R. 2. cap. 3. the Contract being upon Land, and denied the Case, *Hill. 8. Ca. 1. Cra. 296.* which saith, that when a Thing is in its Nature Maritime, as in the Cases of Mariners Wages, the *Admiralty* shall have the Conusance of it. *Woodward against Bonithan, T. Raymond 3. and 3 Levins. 60. Coke against Cretcher, &c. 2 Vent. 181.*

Prohibition does not lie for Mariners Wages.
Contract not Marine made at Sea. If a Contract or Obligation be made upon the Sea, yet if it be not for a Cause Marine, the Suit upon this shall be at *Common Law*, not in the *Admiralty*, *Hob. 11.*

Contract at Sea settled at Land. If the Original Contract be made at Sea, on a Marine Cause, and after reduced into Writing at Land, the *Common Law* not *Admiralty*, shall have the Conusance. *Hob. 79. 212. Palmer against Pope.*

If a Charter-Party be made in *England* to do certain things in divers Places upon the Sea, tho' that no Act is to be done in *England*, but all upon the Sea, yet no Suit shall be in the *Admiralty* for Non-performance of the

the Agreement; for the Contract is the Original and is out of their Jurisdiction, and where part is triable at Common-Law, and part in the Admiralty, the Common-Law shall be preferred. *Maldonado and Slaney, 1 Roll. Abr.*

532, 533.

A Contract laid to be made *infra fluxum et refluxum Maris, &c.* is well enough laid to give the Admiralty a Jurisdiction: It was upon the high Seas, when the Water was at High-Water-Mark; and it might be at Land when the Water was at Low-Water-Mark. In that Case there is *Divisum Imperium* between the Common-Law and Admiralty Jurisdiction.

It was moved for a Prohibition to the Admiralty, because the Libel was to execute a Sentence of the Alcade, which is the Admiralty at *Malaga* in Spain, upon a Thing done within a Port there; and after a Rule for a Prohibition *nisi*, 'twas moved that no Prohibition should be, for tho' this Court will not execute the Sentences of any Foreign Court, as much that it is governed by a distinct Law, yet these of the Admiralty may, and this in their use to do so, for this that all the Admiralty Courts in *Europe* proceed by the same Law, viz. the Civil-Law, and *Wibrel* and *Wini's Case* 3. *Ja.* was cited, to be adjudged accordingly. But upon Reading the Libel in the Principal Case, it appears, that the Sentence was not Definitive, but Interlocutory, concerning a Matter that sounds as an Action upon the Case, and no Sun set; and also the Alcade is not as an Admiralty there, and for this a Prohibition was granted. *See Maldonado and Gregory, 1 Sid. 418. Levinz. 267. 1 Kent. 32. and 2 Kable 51.*

Rescous, and Contempt, triable there. Motion for a Prohibition to the Admiralty, for that they libelled against one for rescuing a Ship, and taking away the Sails from one that was executing the Process of the Court, against the said Ship, and for that in the presence of the Judge and Face of the Court, he assaulted and beat one, and spake many opprobrious Words against him. Now seeing that these Matters were determinable at Law, the Ship being *infra Corpus Comitatus*, and they could not adjudge damages to the Party, or Fine or Imprison, a Prohibition was prayed, but denied, for they may punish one that resists the process of their Court, and may fine and imprison for a contempt tho' they are no Court of Record, but if they should proceed to give Damages, they would grant a Prohibition *quoad* that. *Sparkes, &c.* against *Martyn, 1 Vent.* 1. The same Doctrine Lord *Raymond's Reports*, 446. and *1 Vent.* is there cited.

Goods taken by Piracy, triable there tho' sold at Land. A Prohibition prayed to the Admiralty, where there was a Libel for a Ship taken by Pirates, and carried to *Tunis* and there sold, for that it did not appertain to the Court to try the Property of the Ship being sold upon Land. *Curia* in regard it was taken by Pirates, it is originally within the Admiral Jurisdiction, and so continues notwithstanding the Sale afterwards upon the Land. Otherwise where the Ship is taken by Enemies, for that alters the Property. Contrary to my Lord *Hobart* in the *Spanish Ambassador's Case* 78. *1 Vent.* 308. *Grav. Eliz.* 685.

Ships found at Sea belong to the Admiral. If Ships or Boats are found on the Sea or upon the Coast, without any Living Creature therein, and no Man claiming the same within a Year and Day, the finder formerly used

to have one Moiety, and the Prince the other Moiety, but now 'tis left to the discretion of the Admiral what the finder shall have for his Travail, Charges, Danger. And if the finder conceal such Goods, whether belonging to the Ship, as Anchors, Timber or other Goods, he shall not only lose his Part, but be fined at the Will and Pleasure of the Admiral.

If Whales or other regal Fish, Ships, or Royal Fish Boats, without any living Thing in them, be driven by force of Wind or Waves only, to any Coast or Land, then all doth belong to the Admiral, *Lex. Mercat.* 120. *Deodands.*

See more of this Matter, 4 *Inst.* 134, &c. of the Court of Admiralty. 1 *Roll. Abr.* 528, &c. Title Admiralty.

After Sentence in the Admiralty Court for the seizing of a Ship, Trover and Conversion at Law will not lie. *Beake contra Tyrrell*, 3 *Mod.* 194. *Carth.* 31. Trover after Sentence will not lie.

Huckinson killed one *Colson* in Portugal, and was acquitted there of the Murder, the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom, which by the Opinion of all the Judges was such an Acquittal by their Law, that he could not be tried here again. Acquittal of Murder in the Admiralty in a Foreign Kingdom, he shall not be tried again here.

The Admiralty hath not Jurisdiction of Wrecke. 5 *Rep.* 106. 2 *Inst.* 167. 4 *Inst.* 154. 15 *R.* 2. c. 3.

Case upon the Statutes, 13 *R.* 2. c. 5. 15 *R.* 2. c. 3. and 2 *H.* 4. c. 11. for suing in the Admiralty for matters done upon the Land, and declared that the Plaintiff was going from the Port of London, with his Ship laden with Merchandizes, and that the Defendant brought a Suit in the Admiralty to stay the Ship, till caution should be given, that she should sue in the Admiralty for matters at Land. See Andr. 231. 2 *Stra.* 1097.

should not traffick with Infidels, within the Limits of the Charter of the *East-India Company*; and that they procured the Ship to be arrested by Process of the *Admiralty*, and to be detained, by which the Plaintiff lost the Profit of his Voyage; upon not guilty pleaded, a Special Verdict was found, viz. they found the Charter of the *East-India Company* of 13 Car. 2. by which they are incorporated, and had the sole Trade to the *East-Indies*, granted to them, with a Prohibition to all others to traffick with *Infidels* there upon pain of Forfeiture of Ship and Goods, and that the Plaintiff had prepared a Ship and Goods to go to the *East-Indies* to traffick with Infidels within the Limits of the *East-India Company*; upon this they petitioned the King in Council to stay the Ship, where an Order was made to the *Admiralty* to stay the Ship by their Process, which issued accordingly, and the Ship was staid, *prout*, &c. all which was done by the Defendants as Agents of the Company, and they as Agents paid the Fees of the Prosecution, and if guilty, Damages for the Plaintiff in *duplo* 1500 l. so upon Arraignment judgment for the Plaintiff, and on Error affirmed. *Sands* against Sir *Josiah Child* and others. 3 4. Inst. 138. *Levinz* 351. 4 Mod. 176. *Carth.* 294. *Alike Case*, 1 Vent. 47. 1 Mod. 18. 2 Keb. 604. *Horne* against *Ivie*,

CHAP. VII.

Of Dominion established by Treaties of Alliance in general.

- I. Of Treaties, their ends.
- II. Of the matters considerable in the making of them, and how the Overtures are made.
- III. Of the various Sort of Treaties, and first of those by interview.
- IV. Of the pretents generally made to obtain such Treaties.
- V. Of Princes equal, the honour is to be paid by him in possession.
- VI. Of Treaties by Princes unequal.
- VII. Of Treaties secret and open.
- VIII. Of Things requisite for Princes during such Treaties.
- IX. Of Places proper for Treaties.
- X. Princes where obliged to treat personally, and where not.
- XI. Deputies, their demeanor generally considered in Treaties.
- XII. Of the Clauses generally to be considered in Treaties general and particular.
- XIII. Of the nature of Treaties generally considered as to their ends, and where they determine by the Death or Dispossession of a Prince, and where not.
- XIV. Of Treaties to what end, and how they have been strengthened in England.
- XV. Of the Causes ordinary procuring such Leagues.
- XVI. Of Leagues by way of Mediation, tending to the procuring of a general Peace with Warranty.
- XVII. Considerations on Leagues defensive and offensive, and of the Advantages and Disadvantages thereof in reference to the Estate confederate.
- XVIII. Leagues defensive construed offensive in favour of the Oppress.
- XIX. Contribution, the difficulty in regulating the same to the satisfaction of the Persons interested.
- XX. Of Leagues concluded by Deputies, and the Difficulties

facilities used to delay, by which designs may secretly be carried on.

XXI. *Consideration had on Leagues made for carrying on some particular Enterprize.*

XXII. *Of the Causes that generally occasion a Rupture.*

XXIII. *Of the Obligation on Confederates in reference to mutual Succours.*

XXIV. *Of Aid granted to particular and common Allies when invaded by one another, and of Protection granted a People when oppressed, whether Aid to such may be consistent with a League.*

XXV. *Whether the Oath taken for the Performance of the League be personal, or binds the Successor, and of the Interpretation of the same.*

XXVI. *Of Leagues made with Princes when driven out of their Countries, whether they remain valid and firm.*

XXVII. *Whether Leagues may be entered into by Christian Princes with Infidels.*

I. **T**REATIES are occasioned by a wise and prudent Care of inspecting the Motions of Neighbours and of their Affairs, the which are generally reduced to these three Heads, upon the Considerations,

1. *How a Prince should govern himself with his Neighbours.*

2. *In gaining a Credit among them, and to have a part in their Deliberations.*

3. *Is the main, which is to pierce into his Neighbours Designs; for those Centers being discovered, a Prince easily knows how to draw his Lines.*

II. In Treaties, the first thing to be considered is the manner of making the Overture; and therefore it may so happen, that of two Princes who are Enemies, the one will not seek unto the other for an Accord; therefore the general *Medium* is, that the motion be propounded by some greater Prince, or by some Neighbour

Neighbour that is a Friend to both, and sometimes the Ministers of two Princes meeting accidentally, if they be employed, yet propound an Accommodation. When a Prince or State is exasperated with another, and having gotten an Advantage, will often refuse to treat any where but in his own Country, nor that unless first sought to by a submissive Request, as by Letter, &c. So they of *Holland* and *West-Friezeland*, considering the miserable Distress and incorrigible Disorders of their People, did submit thus to confess their Errors.

Peace betwixt *Charles* the Eighth and *Lewis* *Sforse*.

† *March* 8, 1653, by order of those States, subscribed *Herbert Van Beaumont*, and afterwards by a Letter from the *States General*, praying a Neuter Place, *April* 30, 1653, then by a Petition $\frac{20}{30}$ *June* after. *Leo ab Aitzma*, fol. 817, 818, 825.

III. Treaties are acted either by the interview of Princes, or by persons sufficiently commissioned for that purpose.

Those that are by interview, have been often disapproved, though often practised; but that depends rather on the Estate of Affairs, and the conformity and diversity of Honours, and manner of living of the Princes and their People, than of the interview; that of *Lewis* the Eleventh with Duke *Charles* of *Burgundy*, and of the same King with *Eward* the Fourth of *England* past fairly: And in all such Treaties they govern themselves in reference to their supplies, according to the Confidence which they repose in each other. || But || those interviews of Princes have ever been observed dangerous; for Princes measure their quality not by the extent of their Dominions, but by the absoluteness of their Power: So that he that is supreme and independant in his own Country, counteth himself equal to any

a personal
Treaty with
the Duke of
Orleans, flew
the Duke
though a
Sovereign
Prince.

*Mayer lib. 15.
Phi. Comines,
lib. 4. cap. 10.*

*Richard How-
den in Rich. 1.
fol. 666.*

any other Prince, how great soever. Per-
chance some youthful Kings may disport and
solace themselves in one another's Company,
whilst yet Pleasure is all the elevation of their
Souls; but when once they grow sensible of
their own Greatness, (a Lesson they will quick-
ly learn, and shall never want Teachers) then
emulation will be betwixt them, because at
their interview they cannot so go in Equi-
page, but one will still be the foremost, either
his Person will be more proper, or Carriage
more Court-like, or Attendance more Ac-
complished, or Attire more Fashionable, or
something will either be or be conceived to
be more Majestical in one than the other:
And Corrivals in Honour count themselves
eclipsed by every beam of State which shineth
from their Competitor; therefore some hold
the best way to keep great Princes together is
to keep them asunder, accommodating their
Business by their Ambassadors, lest the meet-
ing of their own Persons part their Affections;
as it fell out between King *Richard of England*
and *Philip of France*, and *Maximilian the First*
and *Lewis the Twelfth*.

IV. It is presumed, that the Personal Trea-
ties of Princes are not for matters small and
trivial; therefore it is an undoubted Maxim,
That as Jealousies may be increased amongst
Neighbours, by reason of such personal inter-
views, so they must find out some apparent and
important pretext, which being made known and
published to remove the Jealousies of their Neigh-
bours, they may then under such colour and
shadow, treat the most secret of their Affairs.
So Pope Clement the Seventh, under the bor-
rowed Pretext of a general Peace and League
against the *Turks*, (which sounded pleasingly
in

in the Ears of all Princes) at *Moselles* concluded the Marriage of his Niece with *Henry* the Second of *France*.

V. But if of two Princes, the one goes home unto the other, he is bound to do him the Honour of his House; and if the Prince be inferior to him, he commonly sends forth some of the principal Officers of his Court to receive him; but if he be his equal in Quality, as being both Kings, although there be some debate betwixt them for Precedence, if he come first to the place where the Treaty is to be made, he must go in Person and not by Proxy.

In the Interview that was between *Lewis* the Twelfth and *Ferdinand of Arragon* at *Sa-
vona* (which then belonged unto the *French* King) *Lewis* the Twelfth at the approach of *Ferdinand's* Galley (before he could land) entered into it, accompanied only with his Guard, to testify his confidence, and thereby to assure King *Ferdinand* of that which he had promised he should find in him; and at their going to Land, King *Lewis* left the Right-hand to *Ferdinand*, who lodged in the Castle, as the most honourable Place, and himself went to the *Bishoprick*.

*Vide Emilie
Paulus's Hi-
story of
France; and
Feron his
supply of the
same, of the
like of the
Duke of Or-
leans, after-
wards Lewis
XII. upon the
failure of issue
male of
Charles the
8th.*

VI. By the Laws of *Treaties*, when two Princes unequal in Quality parley, the inferior is to come first to the place of Congress there to attend the Greater; yet the contrary hath been most commonly observed upon this very reason, that he that is less ought first to wait on the Greater, and from thence go to the place appointed for the Parley; and this was particularly done at the interview of Pope *Clement* the Seventh and King *Francis* the First,

First, although that *Marseilles* were in the King's Subjection.

VII. Again, Treaties by those that are sufficiently commissioned for that purpose, are to act either secretly or openly. Treaties close or secret are usually made, in order to the compleating or settling of Leagues between two Princes or States, sometimes by entertaining him with whom they treat under such a Pretext, to deceive him in the end; at other times to surprize an Enemy, or to assure a Prince of two Enemies, treating with one secretly, the other openly, and the like. These are the ordinary Policies among Princes, and

† So *Maximilian* and *Ferdinand* having twice abused *H. 8.* proposed a third, which was, that he would resign up the Imperial Crown to him; the Resignation is sent to *England* and approved, *H. 8.* is to come to *Aquisgrave* to receive the Crown, and *Maximilian* is to accompany him to *Rome* to receive the last Right of

wherewith the wisest of Kings †, and the most knowing Councils have been deceived and abused even to accept of a Treaty, when at the same time the Proposer hath no other thoughts than to betray them; the *Spaniards* have been famous at these Projects. Memorable was that design of theirs to interrupt the League, which was ready to be made between the Princes of *Italy* and Pope *Clement* the Seventh, after the Battle of *Pavia*, propounding unto the Pope to treat and accord, the which not only hindred the League, and staid the preparations of War which he might make, but also caused him to discharge the Troops which he had drawn unto him for his safety. So *Bourbon*, General of the Imperial Army, entertained the Pope with an accord, whilst his Army marched to the Walls of *Rome*.

VIII. Hence

the Imperial Dignity, and having given him the Investiture of *Milan*, in feodo more Imperiali, then in possession of the *French*, and in enmity with the House of *Austria*: All things being thus concluded, and *H. 8.* having paid the Monies agreed on, and made ready his preparations. *Charles* the Fifth, and Grandson of *Maximilian*, is a

rub in this League, who must be first removed; thereupon the old Fox the Emperor sends a Proposal, that he would come first into the *Netherlands* to take off his Grandson, which while agitating, he strikes up a secret Peace with the *French King*, and so *H. 8.* is betrayed a third time, and the Agreement refused to be complied with, *Cotton Treaty of Amity, fol. 99.*

VIII. Hence it is, that during Treaties, be they open or secret, the Princes or States concerned in them must watch the more carefully, have the diligenter Eye, and by all the ways imaginable reinforce their strength, not only to frustrate their Enemies of all hopes to surprize them, but to the end the Consideration of their Force and Opulency may put them in a posture to obtain Conditions of more Advantage. Besides, it is an undeniable Maxim, that no treaty must be held firm, valid, and concluded, unless it be ratified by that Prince or State with whom the same is made, especially if it be with a Prince whom they detain Prisoner; for by † Law †

Sacramento quidem vos tenere qui potuit, quum projectis facibus & de-

posito Imperio privatus & captus ipse in alienam venisset potestatem? Curio in Cæsar, to those that had been the Soldiers of *Domitius*, so spake, *lib. 11. de Bello Civili. Vide Grot. lib. 2. cap. 13. §. 18.* Pope *Clement* the Seventh refused to ratify the Treaty with *Duke Ferrara* which he made when a Prisoner, saying, That it was a dishonourable thing for a Man in Life to ratify a matter done in his Name when dead, not consistent with his Honour nor Interest. So *Francis* the First excused himself to ratify the Treaty of *Madrid*, upon the inhumanity done to him by the permission of *Charles* the Fifth, they being extorted from him, nor did they take place, though the King left his Children as Hostages.

IX. Again, as in the Parlies of Princes, the place where the Interview is to be made is very considerable; so is it in Treaties which are transacted by Embassadors, Agents, Envoys, &c. if it be to compleat a Peace, or settle a League, it must not be too far from

November 7,
1659.

the Confederates, but at some convenient place, to the end they may have the more speedy Answers from their Principals; but then the first is always to be in some place Neuter, or sometimes upon the confines of Kingdoms; for that it is neither reasonable or honourable to treat a Peace in the Territory of one's Enemy; but the latter touching Leagues may be any where. That of *Edward* the Fourth with *Lewis* the Eleventh, was in the Territories of the Duke of *Burgundy*, but that was personal: And that between *France* and *Spain*, concluded by Cardinal *Mazarine*, and *Don Lewis Mendez de Haro*, Plenipotentiaries of both Crowns, was in the Isle of *Pheasants* in the River *Bidassoa*, upon the Confines of the *Pirenean* Mountains. And the last great Treaty which begun at *Cologne* in the year 1673, under the Mediation of *Swedeland*, in order to put an end to that War, wherein most of the Crown'd Heads of *Europe* were involved, was looked upon as a place proper; but the seizing of Prince *William* of *Furstemburg*, and the taking of forty thousand Crowns out of the Waggon of the *French* Ambassador in a Neutral City, broke off that Negotiation; and though the violence committed on this Prince, by the Emperor's Ministers, and the Injury done to the *French* King, gave ground to fear, that there was no Peace to be expected, and that the Most Christian King would never consent to the renewing of the Treaty, unless reparations were first made for those two injuries; Nevertheless, at the instance of the King of *England* (whose Mediation was generally embraced by all the Princes concerned in that War) and at the solicitation of the Bishop of *Straßberg*,

Strasberg, who publickly declared he preferred the Advantages of Peace before the Liberty of his own Brother; *Nimeguen* was pitched upon as a place neuter and proper for a Treaty, and thereupon the *French King*, 17 February, 1675, named for that Effect the Duke of *Vitry*, Monsieur *Colbert*, and the Count *D'Avaux*, his Embassadors.

X. Embassadors having received Orders to treat, the Prince, to whom such are sent, is not by the Law of Treaties bound to treat personally, but only to depute some of his Council for that Effect; the Reason is, for that the Dignity of a Prince may receive some detriment, which cannot be maintained amidst the Contestations which happen in Conferences.

But if an Embassador be deputed as Lieutenant to a Prince, there indeed such Commissioner is not bound to treat but only with the Prince himself; and so it was where the Bishop of *Gurgias* was deputed by the Emperor to Pope *Julius* the Second; the Pope commissioned three Cardinals to treat with him; but the Bishop having notice in what quality he was like to be received, commissioned three Gentlemen to confer with them, excusing himself upon other Affairs, which afterwards was explained, that he came not as a single Embassador, but as a Lieutenant to the Emperor, in the which Quality he had been received at *Rome* by the Pope: Yet it hath so happened, that Embassadors, if not admitted to a personal Treaty, have refused the Discharge of their Commission; and so did Chancellor *Marvel*, Embassador from the *French King*, who delivered his Message to *Philip* Duke of *Burgundy*, was interrupted

Julius Ferratus de Legatis Principum, & de eorum fide & officio.

There is commonly in the instructions provided for the Embassador in that point if the matter should come into debate.

Phil. Comines
lib. 1.

by *Charles* the Duke's Son, *I am sent*, said he, *not to treat with you, but with your Father*; and *Mr. Wade*, who being commissioned by *Queen Elizabeth* to *Philip* King of *Spain*, would by no means admit himself to be turned over to the *Spanish* Privy-Council, but would either have Audience from the King himself, or would return without it.

XI. The *Deputies* being assembled, their Seats are considerable; they having no power to quit any thing of the rank which their *Masters* ought to hold; and by the Law of Treaties the first place is at the head or end of the *Table*, (if there be one) the second is the first on the right hand, and the third is the first on the left hand of him that is at the end; and if there be many *Deputies* to one Prince, they usually sit at one side, to have the more facility to confer together, if it be needful.

So *Julius* the Second did, who finding himself prest to make Peace with *Lewis* XII. sent Cardinal *Final*, and Bishop of *Tivolly* to *Paris*, but never armed them with

XII. The Embassadors having concluded and settled their Places, their Commissions of each side are to be inspected and considered; and therefore it is an undoubted Maxim, That when they are general or ambiguous, the Principals have no will to conclude; or if they are fair and plain, yet there may be wanting power to conclude; or having power to conclude, it may be with a *Salvo* till they are ratified.

Power to conclude: this was to frustrate the important instance of the Consistory.

The principal Clauses generally are,

1. Either for Peace or Truce.
2. For Restitution of that which they pretend hath been unjustly taken away.
3. For the Cession of Rights.
4. For

4. For Limits and Bounds, the which if they cannot regulate, they put them in suspence, or else they make some Act, which may interrupt the prescription of him which holds them.
5. For passage, with consignment of Hostage.
6. For Forts or Castles for Assurances.
7. For an Offensive and Defensive League.
8. For Neutrality.

In the managing of all which, and of all other matters proper for such Treaties, a special regard must be had not to move for a Person odious to him with whom the Treaty is made, nor to yield to the first demands though never so just, but resist them stoutly; but if danger is imminent, then it is a certain Maxim, *Not to study so much to negotiate with advantage, as to provide for safety.*

XIII. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances, equal or unequal.* The *equal* is either of single Friendship only, for the entertainment of Traffick, or for aid and succour; that of succour is for the *Defensive* or *Offensive*, and sometimes for both, with or against all Men, or against some certain Princes and Republicks; and their Alliances are contracted, either from *Estate to Estate*, and for the Preservation of the *Estates* of each other (in which case by the death of the Prince they may not be interrupted) or else they are contracted betwixt *Prince and Prince*, and then the death of one suspends till a new Treaty hath confirmed it, unless there is a time certain prescribed by the *Treaty*, to the which the Alliance must continue after the death of the

The Leagues between the Crown of France and Spain, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects, and have in time past been look'd upon to be the firmest of Alliances. *Phil. Comines lib. 2.*

cap. 8. And *Prince*; or else they are made from an *Estate* in the very Alliance with to a *Prince*, where the death of the *Prince* France con- does likewise, if not dissolve, yet at least sus- cluded *July* pend till a new Treaty of Confirmation of the 31. The first precedents, although by the Laws of *England*, Article is in *Rex non moritur*. these words:

That there be an universal and perpetual, true, and sincere Peace and Amity between the Most Christian King and the King of Great-Britain, their Heirs and Successors, and between the Kingdoms, States, and Subjects of both, &c. Vide 9 E. 4. 2. a. The League then made with the Scots, and likewise between Edward the Fourth, and the Duke of Burgundy. Phil. Comin. l. 3. c. 6.

XIV. Sometimes *Alliances* are contracted for an Enterprize and for one effect only, in the part in which the Allies are interested, and such are generally called *Leagues*, which in *England* have been sometimes confirmed by

* Rot. Pat. 4. Act of Parliament *.
H. 5. num. 4.

Coke 4. Instit.
156.

Grot. de jure belli & pacis
l. 2. c. 15.
§. 3.

Leagues are such Agreements that are made by the Command of the supreme Power, and whereby the whole Nation is made liable to the Wrath of God, if they infringe it.

All leagues or Safeconducts are, or ought to be of Record, that is, they ought to be inrolled in the Chancery, to the end the Subject may know, who are in Amity with the King, and who not, who are Enemies and can have no Action here, and who are in League and may have Actions Personal here, 4 Inst. 152.

Leagues commonly are *Offensive*, but in effect they tend to attempt against some one, and in the bottom are lodged *Articles of Secrecy for the Enterprize*: And such was that of *Cambray* against the *Venetians*, in which they borrowed the pretext of *Religion and the Peace of Christendom*.

Treaty of
Cambray, the
Confederates
of which were

XV. The

Pope *Julius* the Second, the *Emperor*, Kings of *France*, *Spain*, and *Arragon*, Anno 1558. Vide History of the Republick of *Venice*, fol. 87.

XV. The ordinary causes for which *Princes* and *Republicks* make Leagues, are either to facilitate a Conquest, as that that was made between *Lewis* the Twelfth and *Ferdinand of Arragon*, for the Realm of *Naples*; or to balance the Forces of one that is more mighty, in hindering him that he grow not greater; but Arms ought not to be taken to diminish such a Neighbour's power, for that fear is uncertain; but prudent Leagues may be made for diminishing their Power.

*Sed ut vim pa-
ti posse ad vim
inferendam jus
tribuat, ab
omni æquitate
abborret.
Grotius de
jure belli &
pacis, l. 2. c.
15. §. 17.*

The *English* made a League to succour the *Hollanders*, not only to balance the growing opulency of the *Spanish* Monarchy, but likewise to increase her own by the Alliance of the *Dutch*. *Quid sequitur?*

XVI. Again, Leagues may be made for the procuring of a general peace by way of *Mediation* of their Neighbours in War, and such was the Treaty of *Nimeguen* mediated by the King of *England*, and concluded Aug. 10, 1678, between the Embassadors and Plenipotentiaries of his most Christian Majesty on the one part, and the Embassadors and Plenipotentiaries of the Lords *States General* of the *United Provinces* on the other part; such was also the League of Union propounded by his late sacred Majesty King *Charles II.* and afterwards concluded betwixt him and the *States General* of the *United Provinces*, for an efficacious Mediation of Peace between *France* and *Spain*, his sacred Majesty of *Britain* having a Prospect of what afterwards happened, and of a War, wherein most inevitably would be involved most of the Princes in *Christendom*; to the effecting of which Peace, his Majesty and the *States General* did obtain a promise from the *French* King to the *Dutch*, to lay

League of Union between his Majesty of Great Britain and the States General of the United Netherlands, concluded at the Hague, Jan. ¹³/₂₃. Anno 1668.

down Arms, on condition the *Spaniards* would formally and solemnly by a Treaty of Peace, quit to him all those Places and Forts, together with the Chastellenies, and their Appurtenances, which they by force of Arms had taken in, or fortified in the then last year's Expedition; or, otherwise that the *Spaniard* be brought to transfer to the *French* all their remainder in the Dutchy of *Luxemburg* (or to the County of *Burgundy*) together with *Cambray* and *Cambresis*, *Douay*, *Ayre*, *St Omers*, *Bergue*, *St. Winox*, *Furnes*, and *Lynk*, with the *Baliwicks*, *Chastellenies*, and all other their dependencies; and the *French* King to restore to the *Spaniard* all Places, Territories, which they have by Arms taken since their entrance into *Flanders*, on condition that the *States General* do reciprocally undertake and secure to the *French*, to prevail with the *Spaniard* to consent to the same Conditions, which once effected would (as was hoped) initiate the tranquillity, and be the Interest not only of the two Warring Crowns, but of all other the Princes of *Christendom*. To the effecting of which there were several Articles agreed; and likewise it was agreed, that if a peace should happen to be made, his Majesty and the *States General* should become Warrantees, and a place left for any other Prince or State to come into the same, who should think it their Interest to keep the Peace of *Christendom* undisturbed, and to restore the *Low-Countries* to their tranquillity: There was provision made likewise by the same, for the Forces of each of the Warrantees to be used against those that should break and violate the same, obliging them to cease the violence, and repair the Party injured.

XVII. A *Defensive League*, which hath no other benefit but a necessary defence, and in the which mean Estates are in a manner equally interested, last usually longer than an *Offensive League*, which is voluntary, and from the which either of the *Confederates* will easily part when he hath more interest: So as in *balancing* the interest of the one and the other, he that shall find himself accompanied with distrust, and an opinion to be irreconcilable to the common Enemy, generally proves the most firm in the League.

The *Wisdom, Courage, Means, and Constancy* of the Prince or State is to be considered; so likewise the *distance* of the *Places*, as well in regard of those with whom they unite, as of those against whom they make the Leagues.

XVIII. *Leagues* having no other limitation, *but the end of the Enterprize* for which they are made, have admitted many large debates in cases of accident: For instance, If an Enemy should take the Country, for the defence whereof the Leagues was made, the Question has been, whether the *Confederates* be bound to assist him who hath lost it in the Recovery; some have held, that the *Defensive* did not extend so far; notwithstanding if there were no Treaty, which had concerned this Conquest, yet it would seem more reasonable to comprehend the Recovery in the defensive, if it be general. For as its end is to preserve the *Ally in his State*, and to attain it, the Forces must not only remain in the Country of the *Ally* to attend the Enemy; but after denunciation and other acts of Hostility done by the Enemy, they must enter into his Country, to the end to prevent him,

The Answer of the Ambassador from *Priverum* to the Senate:

Si bonam dederitis & fidam & perpetuam, si malam baud diuturnam,
Liv. lib. 8.

21.

Pontius Samnis

after restitution made to the Romans,

and the Author of the breach yielded up, *expiatum* (saith he)

est quicquid ex fœdere rupto

irarum in nos caelestium fuit.

Satis scio quibuscunque Dis cordi fuit

subigi nos ad necessitatem

cedendi res, iis non fuisse cordi

tam superbè à Romanis fœderis expiationem

spretam: And a little after,

OR

What more do I owe to thee, O Roman? What to the League? What to the Gods, the Judges of the League? Whom shall I bring unto thee to be the Judge of thy anger and of my punishment? I refuse no People, nor private Men.

An. 1515. *Vid.* Sir Robert Cotton Remonst. of the Treaties of Amity and Marriage. XIX. *Contribution* is one of the main ingredients in a *League*, and is of great difficulty to regulate. It is made either in Men or Money; the Men are entertained by all Parties, or by him only that hath need, or otherwise as the League is. Henry Eighth made a League with Francis the French King against the Emperor Maximilian and Ferdinand, for the Recovery of Milan, which he did, for the protection of his Neighbour, and Reduction of the Swisse from the Imperial side, for which he employed the Bastard of Savoy; the agreement was of reciprocal Succour of 10000 Men, if the War were by Land, and of 6000 if it were made by Sea; and in all other occasions, the French King was bound to assist the King of England with 12000 Lances, and he the King of France with 10000 Foot at his charge that had need.

So where *Contribution* is concluded for Money, there are difficulties that do arise from the Person or Place where it must be kept; to deliver it unto the hand of the strongest, is not safe, for fear they shall not be able to call him to account; to lay it in a weak place, were to expose it to the attempt and force of the strongest, or to him that shall first take Arms; but it has been usual for the sum

not

not to be advanced till after the War begun.

XX. Leagues concluded by the *Deputies* of the *Confederates*, there sometimes falls out a difficulty who shall ratify and declare himself first. In the League which was made between *Francis* the First, the *Pope* and the *Princes of Italy*, the King refused to ratify until the *Pope* and *Venetians* had ratified before him, and in that he so cunningly wrought, that he procured the *Collegues* to declare and begin the War, whilst that he treated secretly for himself, to the end he might make his Conditions with more advantage; this he declared was for fear those *Italian Foxes* should shew him the like.

Andrea Mauricani Hist. Ven.

XXI. Leagues made for an Enterprize succeed seldom according to the hope of the *Allies*, if the *Enterprize* be long; for besides that the preparations be long, the opinions divers in the pursuit, the resolutions inconstant, the interests of Princes or States in a League may change with time, or with the practice of him against whom they are in League in withdrawing some one of them, or making him to suffer more loss than the rest; for seeing himself ill defended or succoured by his *Confederate*, and that he was in a greater danger to lose than his Companions, he then studies to retire *, and to make his accord apart, as did the *Venetians* with the *Turks*, after the loss of *Cyprus*.

* If one part hath violated the League, the other may

depart from it; for the several Heads of the League have every one the force of a Condition, so *Grotius* conceives, l. 2. c. 13. §. 15.

XXII. The ordinary causes of the rupture of Leagues are distrust and jealousy, as if one hath had conference with the Enemy, without the consent of the rest; if that which serveth

Soluti fœderis culpam sustinent, non qui deserti ad alios se conferunt, sed qui quam

jurati promiserant opem re non præstant. Alibi apud eundem, si vel

tantillum ex

dictis pars altera trans-

grederetur,

rupta fore

pacta. Thucyd. lib. 1.

19 E. 4. Vide

Stat. 2. H. 5.

c. 6.

Hill. 14.

Elix. in the

Duke of Norfolk's Case. 4.

Inst. fol. 152.

serveth for the safety of one, diminish the safety of the other, inconstancy, variety, cowardice, division, usurpation without the consent of the others.

So if he treats with the Enemy, not comprehending the other *Allies*, but as *Adherents*; as *Lewis* the Twelfth left the League of the *Venetians*, for that they had made a Truce with him, and had presumed to name him only as an *Adherent*. It was the opinion of *Bryan*, that if all the Subjects of *England* would make War with a *Confederate Prince* or *Republick* in League with the King of *England*, without the assent of the King of *England*, such a War was no breach of the League; and upon the same reason were the resolutions of the Judges in the Duke of *Norfolk's Case*, where the Question was, Whether the Lord *Herise* and other Subjects of the King of *Scots*, that without his assent had wasted and burnt divers Towns in *England*, and proclaimed Enemies, were Enemies in Law, within the Statute of 25 E. 3. the League being between the *English* and *Scots*; and resolved they were, and that the League remained.

In fidelitate feudali dicitur; & si sci-vero velle te aliquid juste offendere & generaliter vel specialiter fuero requisitus, meum tibi, si- cut potero, præstabo auxilium. Orat. Demosthen. de Megalopoli.

XXIII. The Succours that one *Confederate* must afford another *Confederate* (according to the Law of Leagues) against a *Confederate*, is of great Consequence: Three Princes allied, the one makes War against the other, and demands succours from the third; in this Case, if the Treaties of Alliance be only for *Friendship*, it is certain he is not bound to give any succours: But if the Treaty carries an *offensive League*, he must succour the most ancient allied by a precedent Alliance, If the precedent Alliances have been made both

both at one time, he must succour him that is allied in an *offensive* and *defensive League*: But if the League be *offensive* and *defensive* of either side, *he ought not to succour either*; but he may meditate a * Peace, and cause the difference to be judged by the *Common Allies*, which being propounded with a Declaration, that if one refuse, or having once submitted, will not yield to Judgment, he will succour the other, as the *Swede* and *Swiss*, upon several occasions have done; notwithstanding in point of State on such occasions they usually balance their Estate, and looking *more to safety than Justice*, they succour him who being enforc'd, may weaken the powerful, who is more to be feared; yet to unjust Wars there is no obligation; then certainly he ought to be preferred, who hath a just cause of War.

XXIV. By the *Laws of Alliances* Princes may aid *particular and common Allies*, if they be wronged by one of the *Allies*.

But he which is not comprehended in the Treaty of Alliance, cannot be *defended* against him that is *allied* without breach of the *Alliance*; therefore *Mediation* in such cases is the only hopes of the *oppressed*, which not having its effect, if the *oppressed* put themselves into the protection of the *Mediator*, they then become in the nature of his Subjects, and then their *Prince* is obliged to their *succour and defence*, even against his *Allies*, and this is by natural Right.

XXV. By the *Laws of Leagues*, though the Oath binds only the *Person*, yet the *Promise binds the Successor*; for though some do hold, that Leagues do depend upon the Oath as their Firmament, though that is not so

* Nihil intercedi, quo minus Samniti populo pacis bellique liberum arbitrium sit. Liv. l. 8. Grotius de Jure belli ac Pacis lib. 2. cap. 15. §. 13. Vide Mouth History of France, fol. 31.

Equals cannot directly refuse War, nor demand Peace.

Liv. 3. Polybius in excerptis Legationum 35.

When Edward the Fourth was chased out of the Kingdom, and Henry the Sixth was set

up again; yet for the most part, yet the efficacy of such
 by Reason Leagues rests in the *promise itself*, to which
 there was in- for Religion sake the Oath is added. Hence
 serted into it is, that *Promises* made to a *Free People* are
 the same these words, *With* in their nature *real*, because the Subject is a
 the King and *permanent matter*; although the State or Re-
 Realm, that publick be changed into a *Monarchy*, yet
 the League the League remains, for that the body, *i. e.*
 did remain the power is still the same, though the Head
 perpetual. be changed. And the Person is inserted into
Phil. Comines the agreement, not that the agreement may
lib. 3. cap. 6. be personal, but to shew *with whom it is*
Ulpian. Leg. made; for if it be inserted into the League
Jure Gentium, that it shall be *perpetual*, or that it is made
sect. pactum. for the good of the *Kingdom*, or with the
D. pactis. Person and his Successors, or for a time li-
Addequæ Hel- mited, the same does most apparently de-
vetiis causan- monstrate the thing to be real.
tur post mor-
tem Hen. 3.
apud Thua-
num, lib. 97.
in An. 1589. Vide & insignem locum apud Cambden, in Anno 1572.
ubi de Fædere antiquo Gall. & Scot.

However, in all Leagues which tend to
 Peace, though there may remain somewhat,
 whereby words of ambiguity may arise; yet
 the most pious way of interpreting, hath
 been to account the same rather *real*, than
personal; for all Leagues made for Peace or
 Commerce, admit of a favourable construc-
 tion. *Leagues defensive have more of favour,*
offensive of burthen.

XXVI. Leagues made with *Princes*, al-
 though they happen afterwards to be driven
 out of their Kingdoms by their Subjects, yet
 the League remains firm and good; for the
Right of the Kingdom remains with such an
 unfortunate Prince, notwithstanding he hath
 lost his Kingdom: The President, Canon,
 and Plenipotentiary for the Duke of *Lorraine*
 at

Quintus said
to Nabis, We
have made no
Friendship
nor Society
with thee, but
with Pelops
the just and
lawful King
of the Lace-
dæmonians.

at the Treaty of *Nimeguen*, renewed his instances with the *French* Embassadors, that he might obtain some moderation of the Conditions that had been stipulated for his Master; the Emperor did the like, but without success; however, the Duke would not neglect any thing that might give the *French* King fresh Evidences of his desire to merit the Favour of his Majesty, he got Sir *Leoline Jenkins*, and the rest of the Mediators, to declare to Monsieur *Colbert*, that the Emperor had taken into his Service all the *Lorraine* Forces; and in the publick Declaration which the Duke made at *Nimeguen*, he said, *That he had delivered all his Forces to a Prince at Peace with France, that he might make it appear to the King, that though he was expelled his own Dominion, yet he would do nothing that might give his Majesty ground to deprive him of the honour of his favour*: And notwithstanding all these most submissive offers, this unfortunate but gallant Prince was shut out of that famous Treaty, which put an end to a War, wherein almost all the Princes of *Europe* were engaged. On the other hand, Leagues made with the *Invader* cannot be good, for his cause being *unjust, is odious*; but if * the People will ^{1. 1 H. 7. c. 1.} make him King *de facto*, and invest him, the question is then out of all controversy; for then he is become a King *regnant*, and by the Laws of *England*, if Treason be committed against his Person, and † after he is beaten ^{† 4 E. 4. 1.} out, and the King *de Jure* comes to his ^{9 E. 4. 12.} Crown, the King *de Jure* may punish those ^{3. Inst. fol. 7.} Traytors with death.

The Earl of *Warwick* having raised an Army in *France* and *Flanders*, invaded Eng- ^{Ed. 4. in An.} land, and within five or six days after his ^{1470.} landing,

Phil. Comines
l. 3. c. 6.

*Reges qui reg-
nis exuti sunt
cum aliis regni
bonis etiam jus
legandi perdi-
derunt.*

landing, King *Edward's* Forces betraying him, the Earl became Master of the Realm, the King flying for protection to his Kinsman the Duke of *Burgundy*, he kindly in his misfortunes entertained him; yet while he was in this banished estate, the Duke of *Burgundy* renewed the League with the *English*, it being agreed, that notwithstanding King *Edward's* misfortune, the League remained firm and inviolable between the Duke *Charles of Burgundy*, and the King and Realm of *England*: So that for *Edward* they should name *Henry* (who was newly taken out of the *Tower* by the Earl of *Warwick*, at his chasing out of King *Edward*.) Now the true reason that Leagues remain, and are firm, notwithstanding such a change, is, because there goes along with them a tacit condition, viz. of holding their possessions; and therefore the World wondered not, that *Charles II.* having sworn a League with the King of *Spain*, expressly as he was King of *Portugal*, did notwithstanding receive two *Embassadors* from the then new King of *Portugal*; and that without being judged either in *England* or *Spain* to have broken his former Oath and League.

The Duke of *Guise* having formed the League against *Henry* the Third, which was, in regard the King was so cold in the Profession of the *Romish Faith*, that it was in danger to be extinguished by the increase which he permitted of the *Reformed Religion*, especially seeing *Henry* the Fourth then King of *Navarre* was of that Religion, and was to succeed to the Crown; wherefore, by the Mediation of *Philip* the Second of *Spain*, the *Pope* qualified the Duke of *Guise*, Head of that

that *Catholic League*, and (which in point of Government was to set him above the King) avowed him *Protector* of the *Catholic Faith* in the Kingdom of *France*. When *Henry* the Fourth succeeded to the Crown, then this League for security of Religion was most violent, and the *Spaniard* without, hoped, by nourishing thus the *division* within, to carry all for himself at last. To avoid which gin, and to answer all, the King changed his Religion, and negotiated by *d'Offat*, to be received by the *Pope* as a dutiful Son of the *Church of Rome*, demanding absolution for what was past, and making large promises of due obedience for the time to come. The King of *Spain's* interest was, that he should not be received, and thereupon he endeavoured to persuade the *Pope*, that King *Henry* did but dissemble with him, and that under this Disguise he would easiliest ruin the *Romish* Religion: Notwithstanding this, the Cardinal obtained his Reception, Absolution, and Benediction, through the many Promises and Presents which he made to *His Holiness*; whereupon the *Spaniard's* Designs were in a Moment all blown over from *France*, but fell heavily upon the *United Provinces*, which were sorely oppressed, for that they apprehended the Loss and Ruin of their Country, and thereupon they implored Assistance from King *Henry*, who received their Embassadors very graciously, and gave them Assurance of Relief. The King of *Spain*, who wanted no good Intelligence in the Court of *France*, immediately remonstrated to the *Pope*, That his former Intimations concerning *Henry's* Dissimulations, did now appear in the Face of all the World; and that seeing *His Holiness* had

Peter Mathew's History of France in the Life of Henry III.

been so credulous, he knew not now whether they should be able to save the *Catholic Faith* from being subjected to the *Reformed Religion* or no; for whereas the *Hollanders* had revolted from him, only because he resolved to use the true Means for the Establishment of the *Romish Faith* among them; and that now he was in a fair way of reducing them (which conduced so much (by *His Holiness* his Opinion) to the Establishment of the *Romish Faith*) *Henry* had taken their Party against him in that Work; and that at *Paris* he had received their Embassadors to that Purpose, although he knew they were his lawful Subjects, &c.

This startled the *Pope* not a little, who charged *d'Offat* for having betrayed him, and put the Church in Danger. This Argument was as subtle on the *Spaniard's* side, as changing Religion was on King *Henry's*, and therefore the *Cardinal* was not a little perplexed how to answer it to the advantage of his Master; as also coherently to the Considerations of his former Reception into the Church; but at last he replied, That *His Holiness* needed not wonder how in reason of State, those different Religions might join together for political Ends, without Hazard of altering Religion. Thus *David* sought Protection of the *Philistines*, and *Abraham* redeemed the sin-ful *Nodmites*; that he took it to be upon the same Ground; that *His Holiness* himself, not long before, received a *Persian Ambassador*, who was so far from being a Heretick, that he never pretended to the Name of Christian: That it was a plausible Argument which the King of *Spain* used in complaining of *Henry's* receiving and avowing their Ambassador, especially knowing at the same time that they were

were Rebels, and could pretend no Right or Title separate from his Crown; " For Princes (quoth he) when Embassadors are addressed to them, never inform themselves of the Right and Title of those Princes from whom they are sent, but whether they have Possession of the Force and Power of those Places from whence the Embassadors are employed; for it would be an endless Task, and require an infallible true History of the World (which is not to be made by Man) if all the Embassadors, before their Reception, should be obliged first to prove clearly to the World, the just Right by which their Masters derive those Titles and Jurisdictions which they assume to themselves."

Vide Peter Matthew's History of France in Vita Hen. IV.

*In Regno di-
viso gens una,
pro tempore
quasi dua gen-
tes habentur :*

And Princes are to have an Eye to the Power which each Kingdom hath to afford Benefit one to the other, and not to examine their Titles.

XXVII. And as Leagues are Covenants or Agreements made by command of the highest Powers, wherein the Parties are bound over to the Divine Wrath, in case they break their Faith; it hath been a famous question, Whether they may be entered into with those that are Aliens from the true Religion, whereof by the Law of Nature there is no doubt nor difficulty; for that Law is so common to all Men, that it admits not any difference of Religion; but the question is about the Law Divine, out of which it hath been discussed, not only by Divines, but famous Lawyers, as *Oldradus, Decianus, Grotius*; upon the whole they have agreed, that they may be entered into as well with Princes Infidels as Christians; and that is evidently proved, for that before the Law of *Moses* it was lawful to contract Leagues with Aliens from Religion for an inoffensive and harmless behaviour, as that of *Joab* with *Laban*; nor did the Law of *Moses*

*Coke 3. Instit.
fol. 155.*

*Grot. Lib. 2.
cap. 15. §. 8.
9. 10.*

make any change, the example of the *Egyptians* being exprefs in the point. 'Tis true, thofe feven Nations and other Kingdoms, as the *Amalekites*, that were deftinated by Divine Sentence to be extirpated, were excepted; but Leagues of Commerce, and fuch as pertain to the utility of both Nations, or of either Party, are by the Law permitted with the profane: So *David* and *Solomon* made League with *Hiram* King of the *Tyrians*, and that which is very obfervable in the Sacred History, of that Action it is faid, That the Alliance was made by *Solomon* according to the Wifdom which God had given him. 'Tis very true, the *Jews* were generally very cautious of contracting with Idolatrous Princes, and the Reason was, for that they had exprefs Promifes of Victory, but that was conditionally, *i. e.* if they kept the Law, which if performed, they had the lefs need of human Aid. But now under the Gospel fuch

Lib. 7. cap. 3. contracts have a more favourable Admittance, according to that of *Tertullian*: So long as *Israel* only was his people, God did juftly command mercy towards their Brethren alone; but after that he gave unto *Chrift* the Nations for his Inheritance, and the Ends of the Earth for his poffeffion; and that began to be paid which was promifed in *Hofea*, They that were not my people fhall be my people, and the Nations that had not obtained mercy fhall obtain mercy; from that time *Chrift* bath extended unto all the Law of Fraternal Benignity, excluding none from our compaffion, no more than from his Vocation: and therefore as it is no evil to do good to the profane, fo neither is it unlawful to implore their help, as *Paul* invoked the Aid of *Cæfar* and the Chief Captain; fo that at this day there

Horum exemplum fecuti Imperatores & Reges Chriftiani Fædera, aut cum non Chriftianis, aut cum non fane Chriftianis fecere, Conftantius cum Gothis & Vandalis, Juftinianus cum Longobardis, cum Saracenis Theodofius, Honorius & cum Mauris Reges Hifpaniæ, cum Tar-

taris Rodolphus Habsburgensis, Adi Johannem de Caribagena, l. 3. de Jure Belli Romani Pontificis c. 1. Julius secundus Pontifex Turcis usus, Vide Bullstroed part. 3. fol. 28. cited in Marſhe's Case, the Case of Samuel Pellag, that had been Embaſſador to the States of Holland to treat with them from the Emperor of Morrocco.

* Famous was the Piety of *Emanuel Duke of Savoy*, who, when he was able to take *Cyprus* by the aid of the *Great Turk*, refused it.

there is no intrinſical or univerſal Pravity; nevertheless thoſe Alliances have their Circumſtances or Rules of Government, as not to join with them but in extreme neceſſity, according to that of * *Thucydides: They that are treacherouſly aſſaulted, as we are by the Athenians, are not to be blamed, if they ſeek for ſafety, and ſecure themſelves by the aid not of Greeks only, but Barbarians.*

C H A P. VIII.

Of Alliances unequal, and of Protection.

- I. *Of Alliances unequal, in reference to the acknowledging a Superiority or Protection in another.*
- II. *Of Protections by a Prince or State voluntary or mercenary.*
- III. *Of the Conveniences of such Alliances, how considered.*
- IV. *Of the Duty incumbent on the protected, and the obligation in Honour and Justice on the Protector.*
- V. *Of Alliances unequal, and of the ordinary Causes that may tend to a Rupture of the same.*
- VI. *Of the Causes extraordinary that may occasion the Breach of such Alliances.*
- VII. *Of Faith and Assurance implicitly discharged by the delivering of Hostages.*
- VIII. *Of the Differences of Leagues contracted by Princes, through force or fear, differing from Contracts private.*
- IX. *Of Ambiguity in words, how it hath given occasion to Princes to depart from the League, and of the Reputation of Princes on such occasion preserving the Alliance.*
- X. *Of the Firmness and Assurance of Alliances, whether to be found more in Princes, or in Republics.*
- XI. *If one Party hath violated the League, whether it be lawful for the other to depart from the same.*
- XII. *In the Construction of Leagues, the Thoughts not the Words of Princes to be considered.*
- XIII. *Of things tacitly excepted in all Leagues and Treaties, in reference to their nullity.*
- XIV. *Of things favourable, things odious, and others of a mixt nature to be used in the interpreting of Leagues.*

*Andronicus
Rhodius post
Aristotelem,
amicitiæ inter*

I. **U**NEQUAL Alliance is that, which is contracted betwixt Princes or States unequal in Honour, or in Power, with unequal Conditions,

Conditions, the acknowledging the other, *partes hoc aut not for Master or Lord*, but by Honour as the *proprium, ut more powerful, and the better qualified, and potentiore plus some for Protector; and these Treaties are bonoris, infirmiori plus made with those States which take or give auxilii deferatur. Grot. Pension, or which put themselves into Protec- lib. 1. c. 2. §. tion. And such was the League of * Protec- 21. n. 2. It is tion propounded to Queen Elizabeth by the the property of Friendship States-General of the United Provinces, who by 'twixt unequals, that Jaas Van Menin most humbly besought Her the stronger to accept of the Sovereignty and Supreme Dominion over the said United Provinces, upon have more certain and reasonable Conditions and Articles, &c. Honour, and the weaker have more*

Help: *Procullus* adds, that such a Clause is inserted in the League, to signify the one is superior in Authority and Dignity, for both are free, but are *sub patrocinio, non sub dominatione*. *Liv. lib. 37. Cicero Offic. 2.*

* *Non sine metu in posterum, quem tunc praesens necessitas averterat. Grotius Annual. lib. 5. A. E. Mitras. lib. 13. ad An. 1585. Grimston, lib. 12. ad An. 1585.*

Tribute is paid by the *Subject*, or by him, who, to enjoy his liberty, pays that which is agreed upon to him that hath forced him to do it. But a *Pension* is held voluntary from him that is in *Protection*, or from him that is in all other things equal to the *Treaty of Alliance*, to hinder the *Pensioners* that he join not with the *Enemy*, as the *Swiss* to the *French*, or to have Aid and Succours from him.

II. But that *Protection* is most true and honourable, when a Prince or *Republick* takes upon him the defence of another, *freely without Reward*; though some, if not all, find it most necessary to balance Honour with Profit, from this Maxim, that *A pecuniary interest obliges more to succour, than when barely obliged by Oath*. *Leg. non dubia. D. de Cap.*

III. Again, there seems to be a kind of *Protection* or an Alliance, which indeed is no more than a bare pecuniary retaining. Politicians have considered the Subject diversly, either Absolute or Conditional; Absolute is that which is measured by the concurrence of the greatness of Forces, Treasure, Munitions, and other Military Preparations: Conditional is that, the which although it be less than an absolute, yet is more fit to succour us or do us Harm: In this the Neighbourhood is of very great consideration, for that a Neighbour Prince of mean Forces may more easily hurt or succour us, than a great Prince that lies far off; near Succours are always sooner ready and with less Charge. And this makes the Bishop of *Munster* to be in that esteem with the *States of Holland*, and the other Sovereign Princes bordering on his Territory; and the Reason why he is so much the more courted into Assistance and Friendship is, for that his Forces being at hand, if Peace be concluded, he is the more easily dispatched; whereas remote and absolute Princes, their Succours come often too late after the Occasions to defend

The *Genoese*, having put themselves in the protection of the *French King*, revolted; he thereupon changed their Conditions into Privileges, to the end, it might be his Will to deprive them when he should think fit.

us, and too soon to oppress us.

IV. By the Law of *Protection*, he that is protected owes all *Respect* and *Honour* to his *Protector*, against whom, if he conspire or attempt, or strays from his duty, it is lawful for the Protector to make *better assurance*; nay, if he pleases, to make himself *Master*: But then on the other side, the Protector ought to defend and succour the protected, and use him well, for otherwise he may withdraw himself from the Protection, and seek another.

Vide Cardinal. Tbusc. P. P. Concl. 935.

V. In

V. In Alliances that are unequal, there are four kinds of controversies may happen.

First, If the Subjects of a Prince or Republick, that is under the Protection of another, have committed any thing *against the League*.

Secondly, If the Prince or Republick be accused.

Thirdly, If the Fellows, which are under the protection of the same Prince or Republick, contend with one another.

Fourthly, If the Subjects complain of their own Ruler.

To the *first*, if a Fault appears, the Prince or Republick is bound either to punish the Offender, or to render him unto the Party injured, and see or endeavour that Damages may be recovered.

But one of the *Associates* in the League hath no Right to apprehend or punish the Subjects of his Confederate.

To the *second*, the *Confederate* hath a Right to compel his Confederate to stand to the League, and if he will not, to punish him, for that one may take satisfaction or revenge of him that hath offended; and this happens as well amongst those that have no Confederation at all.

To the *Third*, as in Confederacies equal, the Controversies are wont generally to be brought before an *Assembly* of the Confederates, that is to say, such as are not concerned in the Question, or else before *Arbitrators*, or else before the *Prince* of the *Association*, as a Common Arbitrator.

So on the other hand in a *League unequal*, it is agreed for the most part, that the Controversies

This holds as well between Leagues equal as unequal.

Grotius de Jure Belli ac Pacis, l. 1. c. 3. §. 21.

This hath the same Right in Leagues that are equal:

Nam ut quis ultionem sumat ab eo qui peccavit, satis est ut ipse ei qui peccavit subditus non sit.

Grot. de Jure Belli, l. 1. c. 3. §. 21. n. 5.

But that proves not any power of commanding, for Princes do usually try their causes before Judges of their own chusing, *Eod.*

l. 1. c. 3. §. 21. n. 6. Debet eos qui Federis Principes sunt, circa suas quidem utilitates nihil precipuum sumere;

at in communibus rebus curandis eminere supra ceteros.

In Orat. Co-
rinthiorum. controversies be debated before him who is Su-
perior in the League.

To the last, the *Confederates* have no *Cognizance*. In common Affairs out of time of Assembly, even where the *League* is equal, the Custom is for him who is chose *Chief of the League*, to have Command over the *Confederates*, according to the Speech of the *Corinthians* in *Thucydides*, *It becomes them that are Princes of the League, not to seek their own particular advantage, but to content themselves with an Eminency above the rest, in taking care of the common Interest.*

VI. Tho' that the Breach of Faith be much practised in such Affairs, yet there are few Princes found which have not found a *pre-text*; some have pretended to be circumvented by error; others by Change of Affairs have pleaded an excuse, as great Wrongs or inevitable Loss, and apparent danger of the ruin of their *States*, which are the Causes, wherein some say, that an *Oath* is not *obligatory*; the Condition, by reason of the Oath, being impossible or unjust; to these Limitations, some hold they must not keep faith

Oldrad. Conf.
1.

Gregorius,
Perjurium Deo
culpam impia-
git negligencia.

with an *Enemy of the Faith*, nor with him that hath broken his, nor with a Subject, nor with a *Thief* or *Pirate*; certainly, if it be not lawful for a Man in these cases to keep *Faith*, it is not lawful to give it: If it be lawful to capitulate with such Men, it is necessary to hold what we promise, that is, (we presume) when the word is given by him that may give it, and that they rely upon it.

VII. If *Hostages* are taken, he that gives them is freed from his *Faith*; for that in receiving *Hostages*, he that receives them hath relinquished the assurance which he hath in
the

the Faith of him that gave them; so where a *Captain* for his *Prince* gives his Word without *Commission* it binds not the *Prince*.

VIII. Some Lawyers would judge of *Treaties* as particular *Contrabts*, by which means they would stretch the Consciences of *Princes*; for, say they, that as a private Man is not bound by that which he hath promised by *force* or *fear*, so it ought to take place amongst *Princes*, and in *Treaties* which are made betwixt Sovereigns; but that is ridiculous, for that were in effect to banish *Faith* from all publick Negotiations; for there is no *Treaty* but what is usually made in *Arms* by *force*, or through *fear* to lose either Life or Goods, or Liberty, or the *State*; which are causes of *just fear*, and may shake the most constant.

IX. Some Princes desirous to shew themselves more *irreligious* in these Ruptures, have taken subject and occasion upon the *Ambiguity* of some Clauses in the *Treaty*, or upon *Equivocation*, as *Charles the Fifth* did; or else they seek other Occasions, as attempting against those whom their Ally is bound to defend, to the end that drawing him into the field, *he may lay the cause of the Rupture on him*. Upon the words *Evening* and *Evening*, to retain the *Landgraves of Hesse*.

But Princes, who respect such *Treaties* with a pious Intention of preserving them, always remain constant and firm; and though occasion may offer itself, by which they might get *advantage* by the Breach; yet when they remain durable, such respect is afterwards had to their Word and Honour, that fewer and lesser *Securities* will be demanded of them, than one *whose Faith is doubted*.

X. But

X, But Assurances in cases of this Nature have been found more in *Republicks* than in *Princes*; for though *Republicks* have the same Mind, and the same *intentions* as *Princes*, yet for that they move but slowly, it will

Famous was the Answer of the *Carthaginian* Senate to the *Romans* upon the assaulting of *Saguntum*: Whether *Saguntum* was assaulted by private or publick Council, we conceive it not to be made the Question; but this, whether it was assaulted justly or unjustly; for to ourselves an Account is to be given by our Citizens, whether it did it of itself, or by Commission; with you this alone is disputable, whether it were a violation of the League, or no. *Livy B. 31.*

cause them to stay longer in resolving. Famous is that of the *Athenians*, when *Themistocles* in his Oration told them, That he could discover a Matter in which the *Athenians* would reap great Advantages, but he could not tell it, for fear the discovery would take away the Opportunity of atchieving it: Whereupon the *Athenians* deputed *Aristides*, to whom he should communicate the Secret, and with him should consult about the obtaining it: They meeting, *Themistocles* demonstrated, that it was in the Power of the *Athenians* to make themselves Masters of all *Greece*, for the *Grecian* Naval Army was then in their Ports and Protection; whereupon *Aristides* replied, *The same was a Breach of Faith*: But it was answered, *It being for the Publick, all considerations of that kind ought to be laid aside*; whereupon *Aristides* being called by the People to give Report, told them, *Themistocles's* advice was exceeding profitable, but dishonest, for which cause the People wholly refused it.

XI. If one party has violated the League, the other may most certainly depart from it; for the Transgression of the Articles, be it never so little, makes a *Breach* of the *Agreement*, unless it be otherwise prevented by *Condition*, which may be, by inserting into the same, * *that for every Offence it may not be lawful to depart from the League.*

* Grot. l. 2. c. 15. §. 15.

XII. In all *Leagues*, the Thoughts of Prin-
ces and States are to be considered, not what
they said; yet because internal Acts are not
visible by themselves, it is necessary that some-
what certain should be determined, *i. e.* re-
duced to *Heads* or *Writings*, otherwise there
would be no Obligation at all, for then every
one might free himself, by affixing on his own
Words what Sense he pleases. Hence it is,
that by the Dictates of *Natural Reason*, he
to whom any thing is promised, hath a Right
to compel the Promiser to that which right
Interpretation suggesteth, for otherwise the
matter would have no End. And as the re-
ducing of the Treaties into Writing makes
the Agreements plain and obvious, so the
mutual Advance of the Ministers proporti-
onably hastens the Accomplishment. The
Counts *Avaux* and *Servient*, being appointed
for the Treaty at *Munster*, as they passed
through *Holland*, they entered into a Con-
federacy with those States, wherein each Party
reciprocally did bind themselves by Articles,
not only not to treat of any thing without the
Assent and Participation of the other Col-
league, but that the Treaty should be carried
on so equally, as if one of the Parties should
see the other's Business advance further than
his, it should be lawful for the one to desire
the other to proceed no further, till his Af-
fairs were equally advanced; which Articles
bounding the Approaches of each other, soon
hastened the end of that tedious Treaty.

XIII. Again, in all Leagues and Treaties
for Peace, there is this Exception to be sup-
posed in the Contractors, unless some new
Cause intervene, or unless it be by the default
of him with whom the League and Compact

*In fide quid
senferis, non
quid dixeris
cogitandum.
Cic. de Offic.*

*Monmouth's
History of
France, fol.
28.*

*Qui promittit
non offendere,
is subintelligit
exceptionem —
Nisi causa su-
perveniat, nisi
is culpa accesserit*

quis cui promissio ista fit, et pactio fœderis, rebus sic stantibus. Alber. Gentil. de Jure Belli, l. 3. c. 24.

is made, or Affairs continuing in the same posture and state in which they were at the Time of the Contract: And that Saying of Ulpianus and Pomponius concerning private Compacts, viz. *That an Agreement is not violated, from which a Man recedes upon a just reason and motive*, is by Interpreters extended to National Leagues betwixt Princes and States.

XIV. In the Interpretation of Leagues and Truces, there ought to be a very great Care had, in regard of the Sacredness of them; therefore in things promised or secured by such Leagues, some are favourable, some odious, some mixt, or of a middle Nature. Those that are most favourable, are those whose Words tend to Peace, not to War, whose Footsteps leave ever behind the deep Impressions of Misery, Devastation, and Poverty, but more especially when such Leagues are made for *War Defensive* than otherwise; but those are called *odious*, which burden or oppress one part only, or one more than the other, and likewise such as tend to matter of *Revenge* or *Punishment*, or to violate some former acts or obligations, or the bringing in a change or innovation of what hath been constantly settled, and used before. Mixt, as where a Change is propounded; but that is with the Sisters of *Moderation* and *Peace*, which are proportionably good, according, as the Change may be esteemed. — Therefore the Standard Rule is, *That in Leagues and Treaties not odious, the Words are to be taken according to the full extent and propriety of popular use; and if there be more Significations, the largest is best*: On the other hand, we are not to recur to Significations plainly improper,

In L. non possunt. D. de Legibus.

improper, unless otherwise some absurdity or inutility of the Agreement would follow.

Again, Words are to be taken ever more strictly than Propriety suffers, if it be necessary for the avoiding of *inequity* or *absurdity*. *Vide exemplum in L. cum virum C. de fidei commissis.*

But if there be not such necessity, manifest *equity* or *utility* in the Restriction, we are to stay them within the narrowest Bounds of Propriety, unless the Circumstances dissuade.

On the other hand, in *Leagues* or *Promises odious*, even a figurative Speech is admitted to avoid the *Odiū*, or burden, therefore in *Danation*,

Remission of one's *Right*, *Dominion* or *Property*, they are always to be construed to those things which were probably thought on,

and really intended. So Aids and Succours promised from one part only, is to be understood to be due at the *Charges* of him who

shall acquire them.

Grotius lib. 1.

cap. 16. §. 12.

C H A P. IX.

Of Treaties of Truce, Neutrality, and Peace.

- I. *Of Treaties, the various sorts.*
- II. *Of Rules in Cases doubtful.*
- III. *Of Truces amounting to a Peace.*
- IV. *Of the Advantages between Treaties of Truces and Peace.*
- V. *When promoted.*
- VI. *Whether it can prejudice the Pretensions of the Principal.*
- VII. *How preserved and punished by the Laws of England.*
- VIII. *Of Treaties of Neutrality, the various Sorts.*
- IX. *Of the Advantages of the same.*
- X. *In Cases of Necessity where he ought to declare, and for whom.*

I. **T***reaties* are either with *Enemies* or *Friends*, or with Persons which desire to continue *Neuters* with us, or we with them.

The *Treaties* which are made with our *Enemies* are either for a *time*, or *perpetual*.

Perpetual, as the *Peace* that is made to compose all differences, and the *War* that is undertaken for *Conquest*, or for *Reparation* of *Injuries*, or to *restore* the *Commerce*.

Treaties, which are made for a time with our *Enemies*, are called *Truces*; the which are either *general*, for all the *States* of the one or the other *Prince*, for all *Persons*, and for all sorts of *Commerce*: Or else they are *particular*, for certain *Places*, for certain *Persons*, and for the *Commerce*, and sometimes no further than a bare suspension of *Arms*.

A *Truce*

A Truce is an Agreement, whereby, tho' Truce, what the War continue, yet all Acts of Hostility it is. do for a while cease; for between War and Peace there is no Medium, it is, and may be called a War, tho' at present its Operations are intermitted. An Habit may be, tho' at present it doth not operate. A Man may be said to be wise or prudent, tho' he be asleep, and virtuous, tho' for a while he be void of Action. So that a Truce cannot be called a Peace, for tho' the Fight cease, the War continues, 'tis but a bare Suspension of the Acts of War.

Grot. de Jure Belli & pacis, lib. 3. c. 21. §. 1.

II. When any one is bound by *Alliance* not to make *Peace* or *Truce*, without the Consent of his *Ally*, and whose Agreement seems doubtful, they add in the Treaty, that it shall take place for all those the Contractors shall Name, and they set down no prefixed time, but that it shall continue till he refuse, and some reasonable time ascertained after; as that which was made betwixt *Charles* the Eighth and the King of *Spain*.

In the Truce that was made between *Edw. the Fourth* and *Lewis the Eleventh*, there was like provision

made for *Charles* Duke of *Burgundy*, but he refused, and concluded a Peace for himself apart, being angry with *Edward* the Fourth for making the same. *Phil. Comin. lib. 4. cap. 40.* So *Lewis* the Eleventh concluded a Truce for nine Years with *Edward* the Fourth when he had invaded *France*. *Phil. Comin. lib. 4. cap. 8.*

III. Sometimes a general Truce holds the place of *Peace*, as that of a hundred years. Such Truces are commonly made betwixt Princes that are equal in Power, as that betwixt *Spain* and *Portugal*, and will not quit any thing of their Rights by Peace; and yet desire to live quietly in the State wherein they are, satisfying by this Medium the point of Honour.

IV. *Treaties of Truce* are many times less subject to *Rupture* than a *Peace*, which is made *perpetual*; for Princes or States that find themselves aggrieved with a Treaty that is perpetual, seek out plausible Reasons to forsake it, seeing the Grievances cannot be otherwise repaired; but if the time be limited and expired, they may pursue that which they think *ought to be granted*, and the other may oppose; and if they have a desire to continue the *Truce*, there is nothing so easy as to renew it. Hence it is become a *Maxim* in State, That seeing Treaties are grounded on the *Interests of Princes which change with the time, it is necessary to change and settle them at the end of the time, or to break them off*; for it is in vain to trust to a bare Friendship.

'Tis true, the Swedes and the other Confederates with France were for a Peace, and the Marquis Castel Rodrigo then offered a Blank unto the *Hollanders*, which they might treat of at home.

* *Monmouth's History of France, fol. 28.*

V. A *Truce* is likewise made to advance a Peace, and to treat of it; and such was the Truce of the *Hollanders* propounded at the Treaty of *Munster*, who refused absolutely to listen to any more than a Truce; and the Reason that they then gave was, that their Commonwealth was to be maintained by Arms, and that by admitting a Peace, the same might be a means to reduce it to weakness, which would in the end tend to the destruction of that State; nay, they offered the Truce on Terms, that if *France* should enter thereunto, she should oblige herself upon any Breach to reassume War, and that Treaty of Truce was continued, which not long after was converted into a perpetual Peace.

Again, *Truces* are sometimes promoted for the more honest discharge of a *League*, which is made with some other Prince, whom they

they have accustomed to comprehend therein: So as a Peace following it, or a Truce not being accepted by him; they take occasion to leave the League, *it being not his fault* that leaves it, that the War was not ended.

VI. And although it seems that a Truce cannot by its condition prejudice the *pretension* in the *Printipal*; yet it is most certain, that if he which is chased out of a contentious State, consents, that during the Truce the *Commerce shall be forbidden to his Subjects, he doth wholly stop the gate*, as * Lewis the Twelfth did in the Truce which he made with *Gonsalve* after the Conquest of the Realm of *Naples*.

* For the Right remains with him, however he hath lost the possession. *Grot. lib. 2. cap. 16. §. 18.*

VII. In England by the Statute of 2 H. 5. cap. 6. Robbery, Spoiling, breaking of Truces and Safe-Conducts, by any of the King's Liege People and Subjects within *England, Ireland, and Wales*, or upon the main Sea, was adjudged and determined to be High-Treason, but this branch concerning High-Treason, is repealed by the Statute of 20 H. 6. cap. 11. 1 E. 6. c. 12. 1 M. Sess. 1. c. 1. But by the said Act of 2 H. 5. for the better observation of Truces and Safe-Conducts, *Conservator Induciarum & salvorum Regis conductuum*, was raised and appointed in every Port of the Sea by Letters Patents: His Office was to inquire of all Offences done against the King's Truces and Safe-Conducts upon the main Sea (out of the Counties and out of the Leagues of *Cinque Ports*) as Admirals of Custom were used to do. Sir *John Trebil* was committed to the Tower for taking a French Ship, and being brought into Parliament, did there justify the same; but at last

confessed his fault, and begged the King's Pardon. And at the request of the Lords and Commons was pardoned, he making satisfaction for the loss †. Generally all Leagues and Safe-Conducts are, or ought to be of *Record*, that is, they ought to be *Inrolled in the Chancery*, to the end the Subject may know who are in Amity with the King, and who not; who be Enemies, and can have no Action here, and who in League, and may have Actions personal here. Sometimes they have been inrolled in the *Wardrobe*, as being matters of State.

Maxim.

Note, *In all Treaties, the power of the one party, and the other, ought to be equal; nor are they to be held firm till ratified.*

Rott. Scotiæ de Anno 10 E. 3. m. 36. intrus, de puniendo illos qui contra formam Treugæ hominibus de Scotia concessa deliquerint.

Before the Statute, when any breach of Truces or Leagues happened, or was occasioned by the misdemeanors of any of the King of *England's* Subjects, there did usually issue forth Commissions under the *Great Seal of England*, to inquire of the Infringers of the same, and to punish and award Satisfaction to the injured.

VIII. *Princes*, who neither love nor hate any thing absolutely, seem generally inclined to *Neutrality*, and in that govern themselves in their Friendships according to their Interests; and *Reason of State*, in effect, is no other but *Reason of Interest*.

Neutrality may be of two sorts; the one with *Alliance with either part*, the other *without Alliance*, or so much as the least Tye to the one or other, which is that which properly may be called *Neutrality*.

The first is governed by the *Treaty of Neutrality*, the latter by the *Discretion of the Neuter Prince*, whose Carriage ought always

to

to be such, as that he may not give the least glimpse of inclining more to one than to another.

IX. The Advantages of Neutrality are, that the Neuter Prince or Republick is honoured and respected of both Parties, and by the fear of his declaring against one of them, he remains Arbitrator of others, and Master of himself.

And as a Neuter neither purchases Friends, nor *freed himself from Enemies*; so commonly he proves a Prey to the Victor; hence it is held more advantage to hazard in a Conquest with a Companion, than to remain in a State, wherein he is in all probability of being ruined by the one or the other.

But Princes that are powerful, have used generally to preserve a *Neutrality*; for whilst Petty Princes and States ruin themselves by War, he fortifies himself with means, and, in the end, may make himself Judge of their Differences.

On the other hand it hath been conceived, that Republicks that are weak, what part soever they take, it will be dangerous to them, especially if they are in the midst of two more powerful States than themselves; but Experience hath made it appear to the contrary, that *Neutrality* is more beneficial to a weak Prince or Republick, so that they that are at War be not barbarous or inhuman. For although a *Neutrality* does not please either Party, yet in effect it wrongs no Man; and as he doth not serve, so he does not hurt: Besides, his Declaration is reserved till the Issue of the War, by which means he is not obliged, by siding with either party, to gain or lose by the War.

Much practised by the Princes of the Empire and petty States.

X. But if the Neuter be prest by Necessity to declare himself, he must do it for the most powerful of the two Parties, following that Roman Maxim, *That either they must make themselves the strongest, or be a Friend to the*

** Anno 1674. Consul Quintus ad Achæos, quod optimum esse dicant non interponi vos bello: imonibil tam alienum rebus vestris est: Quippe sine gratia vel dignitate præmium victoris eritis, Lucius, lib. 35. Scripta* *strangest: So they of Strasbourg * declared for the Empire against the French. On the other hand, if the Neuter sees, that joining to the weaker, will balance the Power of the stronger, and by this Counterpoise reduce them to Reason; the same hath been generally followed, upon the Maxim, That the safety of States consists in an equal counterpoise of the one, and the other; for as the greatness and opulency of a Prince draws after it the Ruin of their Neighbours, it is wisdom to prevent it.*

Amiras. disc. polit. l. 18.

C H A P. X.

Of the Immunities and Privileges of Ambassadors, and other publick Ministers of State.

- I. *Of the Function of Ambassadors and Agents generally considered.*
- II. *Of the Difference between Ordinary and Extraordinary.*
- III. *Of the Qualifications and Matters requisite to be in such.*
- IV. *Whether any but Sovereign Princes and States may qualify such, and who may not.*
- V. *Of the Right of Ambassadors, how secured by the Laws Divine, and of Nations.*
- VI. *Of Precaution, whether the same may be given to such not to come, and attempting against such interdiction, how to be dealt with; and of the punishment of those that shall violate them, by the Laws of England.*
- VII. *How Princes and States may govern themselves in reference to their Reception or Refusal.*
- VIII. *Whether Ambassadors may be subjected to Punishment when they offend against the Laws of Nations.*
- IX. *Of proceeding against them by Princes and Republicks at this day according to the Laws of Nations.*
- X. *Whether privileged in that State or Country thro' which they pass without leave; and of the various Proceedings against them by several Princes and States, illustrated in Precedents and Examples.*
- XI. *Of proceeding against them according to the Laws of England.*
- XII. *Where they forfeit their Privilege, according to the Laws of England, in things Capital.*
- XIII. *Where preserved in Matters ordinary not malum in se.*
- XIV. *The Office of a publick Minister, what it includes*

cludes in Matters Civil for the King and Nation whom they represent.

XV. Whether the House of an Ambassador can be a Sanctuary to offenders, or that he may exercise Royal Jurisdiction over his own Domesticks and Vassals.

XVI. Whether the Goods of an Ambassador are subject to seizure for Debts contracted by himself.

XVII. Outrages committed by Ambassadors, where a Forfeiture of their Privilege.

XVIII. Of Punishment on those that shall offer Violence to their persons.

XIX. Observations touching the Immunities and Governments of the publick Ministers of Venice.

XX. How introduced by the Laws of Nations.

XXI. Wars whether just for Violation done to publick Ministers.

XXII. The Privileges of Ambassadors and their Servants, as to civil Suits, by the Law of England.

Coke 4. Instit. I. fol. 153.

Agents are generally used when there is some Suspicion that the Ambassador will

AN Ambassador and Agent is the same thing, if we consider only the Function of their Charges: Only in this they differ; an Agent hath charge to represent the Affairs only; but an Ambassador ought to represent the Greatness of his Master, and his Affairs.

not be honoured as he should be; therefore the French Kings of late Years have no Ambassadors in the Emperor's Court, but Agents, because of the Competition for Precedence betwixt him and Spain.

II. Ambassadors are in two Capacities, either Ordinary or Extraordinary: The Ordinary or Lieger Ambassadors, are those who are commanded to reside in the Place whither sent, unless they receive Letters of Revocation; and as the time of their Return is indefinite, so their Business is uncertain, arising out of emergent Occasions, and commonly the Protection and Affairs of the Merchants, is their greatest Care. The Extraordinary or

pro

pro tempore, are those that are employed upon some particular great Affairs, or Condolements, or Congratulations, or for Overtures of Marriage, &c. Their Equipage is generally very magnificent and illustrious, and they may return without requesting of Leave, unless there be a restraining Clause in their Commission.

III. An Ambassador or Agent ought to be conversant in all sorts of History, reading with Judgment, and weighing all the Circumstances of Action which are there represented, by which he will be qualified to know (but especially of that Country whither he is sent)

1. The Establishment of Estates.
2. The Rights of Limits.
3. The Genealogies of Princes.
4. The Pretensions of Kings upon the Estates of others.
5. Their Forces, Means, Alliances, and manner of living. Personally he must be
 1. Resolute and Courageous in that which he hath wisely deliberated.
 2. Secret in Affairs of Importance.
 3. Discreet in his Speech.
 4. No Detractor or Evil Speaker of any King or State, but more especially of him or them with whom he remains.
 5. One that will speak freely of his Master's Pretensions, if there be a Question to maintain them.

IV. By the Laws of Nations, none under the Degree of a Sovereign Prince can nominate or send any in that Quality; nor can any Subject send or receive any Ambassador, be he never so Great; if a Viceroy doth it, it is no less

peter that
brought the
Letters from
the Maid of
Orleans to the
Earl of Suff-

folk was
burnt; and
the Reason of
that was, be-
cause he came
from no law-
ful Prince,
nor one com-
missionated,
or capable of
sending a
Trumpeter.
Grimston's
History of
France, fol.
326.

less than High-Treason; and so it was de-
clared when the *Scots, inconsulto Principe,*
sent *Lowden* and others in Quality of private
clancular Commissioners, to treat with the
French King Lewis the Thirteenth, in the
Name of the whole Nation for Assistance, the
King would not admit or hear them. So did
Queen *Elizabeth*, when *Christopher Assonville*
came into *England* in Quality of a Minister
of State, sent from the Duke of *Alva*, then
Governor of *Flanders*, she refused to admit
him, he not having any Commission or Cre-
dentials from the King of *Spain*. 'Tis true,
the Electors and Princes of *Germany* have ob-
tained the Privilege of sending, and the Re-
ception of Ambassadors, * but that is limited
only to Matters touching their own Territo-
ries, and not the State of the Empire. And
so likewise the *Hans Towns* may do the same;
for they claim the like Privilege, they being
free Imperial Cities, and partake of the same
Regalias, either by Prescription or by Grants
from former Emperors, whose Necessities en-
forced them to part with such Royal Flowers
of the Empire; and generally they † send
for their Ambassadors always two Persons,
one of great Birth, and that hath been a Sol-
dier, to maintain Decency; and the other a
Doctor or Lawyer to regulate Affairs with
Learning, and by the Pen.

*torii ratione; eo enim ipse intuitu tantum datum, ultra igitur terminos non
est procedendum, feret enim alias præjudicium Imperatori, Sc. Kinknerus,*
§. 25. Memorable was that of the *Switzers*, who sent a Message to
the *French King*, that he should not send them an Ambassador with
store of Words, but a Treasurer with Plenty of Money.

† *Monmouth's History of France, fol. 27, 28.*

V. The Right of Ambassadors is secured
both by the Safeguard of Men, and also by
the Protection of the *Law Divine*; therefore

to

to violate this, is not only unjust, but impious *Pompon. Leg. too*: And as *Protection* is given to the *Legates* *fi quis D. de Legationibus.* of *Supreme Rulers* by the *Laws of Nations*, so by the *Civil Law* there is a *Protection* likewise for *Provincial Legates, Heralds, and Consuls*. This *Right of Legation* was originally provided, saith *Livy*, for a *Foreigner*, not a *Citizen*; yet in *Civil Wars*, *Necessity* sometimes makes *Place* for this *Right* besides the *Rule*, as when the *People* are so divided into equal *Parts*, that it is doubtful on which *Side* the *Right of Empire* lieth, as that unhappy *Spot of Flanders*; or when the *Right* being much controverted, two contend for the *Succession to the Throne*; for in this *Case* one *Nation* is reckoned as two; and so was the *State of England*, when the *Houses of York and Lancaster* contended for the *Crown*, properly then called *Commissioners*: Nay, this *Right of Legation* hath been so preserved, that the very *Messengers of Rebels* have been protected, as were those of *Holland* by *Philip of Spain*. So great a *Respect* have *Nations* had in all times to such *Men*, that even * *Traitors*, nay *Pirates* and *Robbers*, who make not a *Society*, nor have any *Protection* by the *Law of Nations*, and with whom neither *Faith* nor *Oath* (as some conceive) may be kept, *Faith* being given them, obtain the *Right of Legation*, as once the *Fugitives in the Pyrenean Forest* did.

Kings conquered in a solemn War, and deprived of their *Kingdom*, with other *Royalities*, lose the *Right of Legation*. *P. Aemilius* detained the *Heralds of Perseus*, whom he conquered.

* *C. Poole* a *Traitor* fled

to *Rome*; the *Pope* sent him *Ambassador* to the *French King*, of whom the *King of England* demands his *Subject*, sed non prevailuit. *Coke Inst. 4. fol. 153.*

VI. *Ambassadors* may by a *Precaution* be warned not to come; if they dare they shall be taken for *Enemies*; but once admitted 4 5 even with *Enemies in Arms*, much more with *Enemies*

Enemies not in actual Hostility, have the Protection and Safe-guard of the Laws of Nations; and therefore their Quality being admitted by Safe-conduct, they are to be preserved as Princes; and so it was declared in *Rot. Pat. 3. R. 3. num. 18. Parliament*, where the killing of *John Imperial*, Ambassador from the States of *Genoa*, was High-Treason, *Crimen lese Majestatis*.

† *Legatus ejus vice fungitur à quo destinatur, & honorandus est sicut ille cujus vicem gerit, & Legatos violare contra jus Gentium est, 22 Affixe, pl. 49.* † So likewise of *A. de Walton*, the King's Ambassador, *Nuncium Domini Regis missum ad mandatum Regis exequendum*, who was murdered by one *John Hill*, which Offence was adjudged High-Treason, and accordingly he was drawn, hanged, and beheaded.

Note, This was three Years before the making of the Statute of 25 E. 3. *quærs*, if such a *Præter* is within the Statute at this Day.

Qui violarit Legatum, Lege Julia de vi publica tenetur. And by the *Julian* Law, he that violates Ambassadors is guilty of publick Violence; that is, of prostituted Faith of publick Authority, and of a Breach of the Laws of Nations; and by the *Pontifical* Law it is no less than a Piacle, and to be interdicted from the Benefit of holy things.

Philomela sung a fatal *Requiem* for the bloody Entertainment which she gave the Ambassadors of *Frederick Barbarossa*, the Emperor having sent them to treat in order to Peace; but they instead of that, avowed the Action of those that murdered his

Fuller's Holy War, l. 3. c. 4. Ambassadors: The offended Emperor having taken the City, razed it to the Ground, and executed all the People therein, as Rebels and Traitors against the Laws of Nations.

VII. On the other hand, Ambassadors may not always be received, though they ought never to be rejected without Cause; for there may be Cause from him from whom they come,

come, as the *Roman Senate* would not admit of the Embassage of the *Carthaginian*, whose Army was then in *Italy*; the King of *Spain*, Camden those of *Holland*; and the then *Pope*, the 1571. Daniel's Ambassador of *Henry* the Second, after the History of Murder of *Becket* Archbishop of *Canterbury*: Henry 2. Carolus quintus Imper. Galliar. Venetorum, & Florentinorum So likewise from the very Persons that are sent, as *Theodorus* the *Atbeist*, whom *Lyfima-cbus* would not give Audience to; and Mr. *Oliver*, *Lewis* the Eleventh's Barber, whom ad bellum sibi indicandum missos deduci jussit in locum qui a comitatu suo abesset, triginta millia-ria. Guic. l. 18. Bellaius. l. 3. they of *Gaunt* refused: Yet *Matthæus Palmerius*, an Apothecary of *Florence*, had better Fortune than the *French* Barber; for he being sent in Quality of Ambassador to *Alphonso* King of *Naples*, and having acquitted himself elegantly, and with much Generosity at his first Audience, the King having Informa- tion that he was an Apothecary, said, *Se tali sono gli speciali di Fierenze, quali debbono essere gli Medici?* If the Apothecaries of *Florence* are such, what shall we think of their Physicians?

So likewise where the Cause of sending is suspected, in reference to disturb the People, or with Intentions rather to sow Sedition, than to conclude a Peace (if such be their Errand) or not honourable or unseasonable. As for those assiduous Legations which are now in use, they may with very good Right be rejected; for the Necessity of them appears by the antient Custom whereto they are un- known, which made *Henry* the Seventh admit of none. Bacon's H. VII.

The *Venetian* having admitted *Henry* the Fourth of *France* his Ambassador, yet they interdicted him * to come with the other Ambassador to the *Chapel*, till the King was reconciled to the *Church* of *Rome*. *Card. Arnold. Offat in his 353 Epistle. Coke 4. Instit. fol. 153.

VIII. By

Menander Pro-
secutor Justin-
Imper. Avaro-
rum Legatos
contra jus le-
gationum in
vinculis ba-
buit, Gosh-
mann. Resp.
32. n. 29.
Coke Instit. 4.
153. 2 H. 5.
cap. 6. 1 M.
Sess. 1. c. 1.
** Quamquam*
viri sunt com-
missi ut hos-
tium loco es-
sent, jus tamen
Gentium va-
luit.

† Fit reus ma-
gis ex equo
bonoque quam
ex jure Gent.
Bomilcar co-
mes ei qui Ro-
mam fide pub-
lica venerat.
An Enemy is
bound to
whom they
are sent; but
their Privi-
lege obliges
not those

VIII. By the Laws of Nations, only unjust Force is kept from the Bodies of Ambassadors; for if the Laws of Nations be broken by him, he is subject to Punishment: Yet the Opinions of Nations, and Men eminent for Wisdom, have been doubtful in this Point, and Precedents on both Sides have been avouched; one which seems to refute that Position of punishing such Ministers of State: The Ambassadors of *Tarquin*, who had committed Treason at *Rome*, and as * *Livy* observes, were in the State of Enemies; yet the *Right of Nations* (as he calls it) prevailed so far as to preserve them, though in a Case of Hostility. On the other hand, † *Salust* observes, that *Bomilcar*, one of the *Carthaginian* Ambassadors, who came to *Rome* on the publick Faith, was adjudged Guilty, rather (saith he) by the Rules of Equity, than by the Laws of Nations: Equity, that is the mere Law of Nature, suffers Punishment to be exacted where there is found a Delinquent, but the Laws of Nations except the Persons of Ambassadors; for certainly their Security outweighs the Profit arising from Punishment, which may be inflicted by him that hath sent him (if he be willing) if unwilling, it may be exacted of him as an Approver of the Crime.

through whose Rounds they pass without Leave; for if they go to, or come from their Enemies, or make any hostile Attempt, they may be slain. *Liv. lib. 26.*

Grotius, l. 2.
c. 18. §. 4.
4. & 5.
Senatus faci-
em secum attu-
lerat auctori-
tatem Reip.
M. Tull. 8.

IX. Again, as Ambassadors are not to render a Reason of their Actions to any other, but to him by whom they are sent; so it is impossible, by reason of various Interests and other Secrets of State, which pass through their Hands, but somewhat may be said, which

which bears a Show or Face of Crime; (which perhaps may prove otherwise) yet the examining and tracing of the Truth, may be of a dangerous consequence; and therefore if the Offence be such as may be contemned, it is usually to be dissembled or connived at, or else the Ambassador be commanded to depart the *Realm*; and if the Crime be cruel, and publickly mischievous, the Ambassador Coke Instit. 4. may be sent home with *Letters of Request* to fol. 152.

his Master, to inflict Punishment according to the Offence: So likewise in the Precaution of a great Mischief, especially publick, (if there be no other Remedy) Embassadors may be apprehended and executed; and if they oppose by force of Arms they may be slain.

Sic Carolus quintus Legatus Ducis Mediolanensis ut subditi sui imperavit, ne à Comitatu suo abcederet, Guicciard. in dict. jam loc. Vide Camden's Eliz. Anno 1571. 1584.

In the Bishop of Ross's Case, *An. 13 Eliz. Co. 4 Inst. fol.* the Question was, *An Legatus qui rebellionem* 152.

contra Principem ad quem legatus concitat, Legati privilegiis gaudeat, & non ut hostis panis subiaceat; and it was resolved, That he had lost the Privilege of an Ambassador, and was subject to Punishment; nor can Ambassadors be defended by the Law of Nations, when they commit any thing against the State or Person of the Prince with whom they reside.

X. And why Ambassadors are in Safety in their Enemy's Countries, and are to be spared when they commit Offences, is not so much for their own or Master's sake, Case of the Ambassador of Muscovy. Lucas's Reports, 4. 5. but because *without them there will never be an End of Hostility, nor Peace after War*: Neither is the Name or Person of an Ambassador so inviolable, either in Peace or in time of War, but there may be both a convenient time and a good Occasion

Occasion to punish them, and this standing with the Laws of Nations, as may appear by these following Examples.

*Thucyd. lib. 2.
Appian de Bel-
lollirica Sicu-
li Atheniensium
Socii Legatos
Syracusanorum
missos ad Civi-
tates alias ce-
pere.*

1. The Law does not pertain to them through whose Bounds Ambassadors pass without Leave; for if they go to their Enemies, or come from their Enemies, or make any hostile Attempt, they may be slain: So the *Athenians* did to the Ambassadors between the *Persians* and *Spartans*; the *Illyrians* to the Ambassadors between the *Esseans* and *Romans*.

*De Gallorum
ad Turcam le-
gatis, quos in
Pado Hispani
cepere occide-
runt, vide Ju-
dicia Perutæ,
lib. 11.
Camden, Eliz.
Anno 1571.
History of
the Repub-
lick of Venice,
fol. 450, 451.*

2. The Emperor *Charles* the Fifth, advertised of the League made against him, would not dismiss the Ambassadors of *France*, *England*, and *Venice*, till his own were in Safety, but he sets Guards upon those of *France*, *Venice*, and *Florence*, causing them to be conducted thirty Miles from his Court, with a Prohibition not to speak to them, nor for them to write. As to him of *Milan*, as his Subject, he was enjoined not to part from Court; but as for him of *England*, there was no Alteration.

3. The *Venetians*, having destroyed some of the *Corfairs*, *Amurath* commanded *Luigi Contarini*, then *Bailio* of *Venice*, to be imprisoned.

4. The *Seigniory of Venice* understanding that certain Traitors, who had revealed their *Secrets* to the *Turk*, were fled for Protection into the House of the *French* Ambassador at *Venice*, sent Officers to search the Ambassador's House; but the Ambassador's refusing them Entrance, the *Senate* commanded certain Cannon to be brought out of the *Arsenal* to beat down his House, which, when he saw planted, he surrendered up the Traitors.

5. The

5. The Ambassadors of *Tarquin*, *Morte affligendos Romani non judicarunt, Et quanquam visi sunt ut hostium loco essent, jus Gentium tamen valuit.*

6. The State of *Rome*, though in Case of *Goodwin de* most Capital Crimes, exempted the *Tribunes* *Leg. Antig. Rom.* of the People from Question during the Year of Office.

7. The Ambassadors of the *Protestants* at the *Council of Trent*, divulging there the *Acta Trident. Concilii.* *Doctrine* of the Church, contrary to a Decree there, whereby it was enacted a Crime equivalent to Treason, yet stood they protected from any Punishment.

It is generally consented by all the *Civili-Pompon. Leg. ant.* That *Legatis de jure Gentium indictum est, utrum corpora salva sint, propter necessitatem Legationis, ac ne confundantur Jura commercii inter Principes.* *alt. D. de Leg. gatis.*

8. *Viva*, the *Pope's Legate*, was restrained by *Henry the Second* for exercising a Power within his Realm, not allowed or admitted of by the King, in disquiet of the State, and forced to swear not to act any thing in *prejudicium Regis vel Regni.* *Benedict. in Vita. Hen. 2.*

On the other hand, it hath been answered, That they are by the Laws of Nations exempted from Regal Trial; all Actions of one so qualified, being made the Acts of his Master, or of those whom he represents until he or they disavow; and *Injuries* of one *Absolute Prince* or *State* to another, is *factum hostilitatis*, and not *Treason*; the Immunity of whom *Civilians* collect, as they do the rest of their Grounds from the Practice of the *Roman State*, deducing their Arguments from these Examples.

Colloquium

Machiav. l. 2.

c. 28.

Liv. 2. Dec.

9. The *Fabii* Ambassadors from *Rome*, were returned safe from the *Chabes*, with demand of Justice against them only, although they had been taken bearing Arms with the *Etrurians*, their Enemies.

Sir Robert

Cotton's Post-
hume.

10. King *Edward* the Second of *England*, sent amongst others a *French* Gentleman Ambassador into *France*; the King upon this arraigned him as a Traitor, for serving the King of *England* as Ambassador, who was his Enemy (but the Queen procured his Pardon).

Rott. Scaccar.

Westm. Clause

Edw. primi.

11. *Henry* the Third did the like to one of the *Pope's* Ambassadors, his Colleague flying the Realm secretly, fearing, *timens pelis sui*, as the Records have it. *Edward* the First restrained another of the *Pope's* turbulent Ambassadors, till he had (as his Progenitors had) informed the *Pope* of the Fault of his Minister, and received Satisfaction for the Wrongs.

12. *Henry* the Eighth commanded a *French* Ambassador to depart presently out of the Realm, because he was the professed Enemy of the See of *Rome*.

Herbert's

Hist. H. 8.

Anno 1523.

13. *Lewis de Prat*, Ambassador for *Charles* the Fifth, was commanded to his House, for accusing falsely Cardinal *Wolsey* to have practised a Breach between *Henry* the Eighth and his Master, to make up the Amity with the *French* King.

14. Sir *Michael Throgmorton*, by *Charles* the Ninth of *France*, was so served, for being too busy with the Prince of *Conde's* Faction.

15. The *Pope's* Ambassador at *Paris* was arraigned, for practising certain Treasons in *France* against the King, in the Parliament of

of Paris, and was found there guilty and committed to Prison.

16. Doctor *Man*, then Ambassador, was taken from his House at *Madrid* in *Spain*, and put under a Guard to a straiter Lodging, for breeding a Scandal (as the *Comde Feri* said) in using by Warrant of his Place, the Religion of his Country, although he alledged the like permitted to *Guzman de Silva*, their Ambassador in *England*, and to the *Hark*, no less than in *Spain*.

Camden's
Hist. Q. Eliz.
A. 1567.

17. *Francis* the First, King of *France*, sent *Cesar Fregosus* and *Anthony Rincome*, Ambassadors to the *Turk*; they were surprized by the Armies of *Charles* the Fifth on the River *Po* in *Italy*, and were put to Death; the *French King* complained that they were wrongfully murdered; but the *Emperor* justified their Death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects feared not to serve the King his Enemy.

Guicciard.
lib. 18.

18. *Henry* the Eighth, being in a League with the *French*, and at Enmity with the *Pope*, who was in League with the *French King*, and who had sent *Cardinal Pool* to the *French King*, of whom King *Henry* demanded the *Cardinal*, being his Subject, and attainted of Treason, *sed non prevaluit*.

Herbert's
Hist. H. 8.

19. *Samuel Pelagut*, a Subject to the King of *Morocco*, pretended that he was an Ambassador sent unto the *States General* of the *United Provinces*; he came to them, and accordingly they treated with him, afterwards he departed; and being upon the Sea, he there took and spoiled a *Spanish Ship*; and then came into *England*; the *Spanish Ambassador* here having received Intelligence of the

spoliation, caused his Person to be seized upon, intending to proceed against him as a Pirate, and imprisoned him; and upon Conference with the Lord Coke, Doderidge, and other Judges and Civilians; they declared their Opinions, That the Caption of the Spaniard's Goods by the Morocco Ambassador, is not in Judgment of Law a Piracy, in regard it was apparent, that the King of Spain and the King of Morocco are Enemies, and the same was done in open Hostility; and therefore in Judgment of Law could not be called *Spoliatio, sed legalis Captio*; and a Case out of 2 R. 3. fol. 2. was vouched, where a Spanish Merchant before the King and his Council in Camera Scaccarii brought a Bill against divers Englishmen, therein setting forth, *quod deprædatus & spoliatus fuit upon the Sea, juxta partes Britannie, per quendam Virum bellicosum de Britannia de quadam Navi*, and so of divers Merchandizes therein, which were brought into England, and came into the Hands of divers Englishmen, naming them, and so had Process against them, who came in, and pleaded, That in regard this Depredation was done by a Stranger, and not by the Subjects of the King, therefore they ought not to be punished; in regard that the Statute of 31 H. 6. Cap. 4. gives Restitution by the Chancellor, in *Cancellaria sibi vocato uno Judice, de uno Banco vel altero*; and by the Statute of 27 Ed. 3. cap. 13. that the Restitution may be made in such a Case upon Proof made, by the Chancellor himself without any Judge; and upon that Case it was resolved, *Quod quisquis extraneus, &c.* who brings his Bill upon this Statute to have Restitution, *debet probare quod tempore captio-*
nis

³ Bulstrode 28.

¹ Ro. Rep. 175.

nis fuit de amicitia Domini Regis ; and also, quod ipse qui eum ceperit & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis querentis tempore spoliationis, & non inimicus Domini Regis sive Principis querentis, qui si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec deprædatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum : The Judgment of which Case was held to be Law, and thereupon the Judges delivered their Opinions, that the Morocco Ambassador could not be proceeded against as a Pirate.

20. In the time of Philip the Second of Spain, the Venetian Ambassador in Madrid protecting one Bodovario, a Venetian, an Offender, that fled into his House, and denying the Corrigidor or Justice, to enter his House, where the Ambassador stood armed to withstand them ; upon Complaint made, the Ambassador was removed unto another House, till they had searched, and found the Offender ; then conducting back the Ambassador with all due respect, a Guard was set upon his House to stay the fury of the enraged People ; the Ambassador complaining to the King, he remitted it to the Supreme Council : They justified the Proceedings, condemning Bodovario to lose his Head, and other the Ambassador's Servants to the Gallies, all which the King turned to Banishment ; and to satisfy the most Serene Republick, sent the whole Process to Inigo de Mendoza, his Ambassador at Venice, declaring by a publick Ordinance unto that State, and all other Princes, *That in case his Ambassadors should commit any Offence unworthily, and disagreeing to their Qualities and Professions of Ambassa-*

Sir Hen. Woot-
ton: State of
Christendom,
fol. 211.

Vide Sir Ro-
bert Cotton's
posthum. and
the Propositi-
on to King
James.

ders, they should not enjoy the Privilege of those Officers, but be would refer them to be judged by the Laws of that Prince or State where they then resided, and where they had injured. It was a great and noble Saying.

21. In the Year 1568, Don Gubernon d'Espes was ordered to keep his House in London, for sending scandalous Letters to the Duke d'Alva unsealed; and in 1586, Don Bernardino de Mendoza was restrained first, and after commanded away.

XI. The manner of proceeding against them, according to the practice in England, hath been conceived necessary to be, that some of the Chief Secretaries of State were sent to the Ambassadors, and by way of advice, that understanding that the common People having received notice of, &c. "And that they cannot but conceive a just fear of uncivil carriage towards their Excellencies or their Followers, if any the least Incitement should arise, and therefore for Quiet of the State, and securing of their Persons, they were bound in Love and Respect to their Excellencies to restrain as well themselves as Followers, till a further Course be taken by legal Examination, where the Aspersions began, the same being in their opinions the best and the only way to prevent the danger, &c."

Sometimes, if the Parliament be sitting, the King acquaints the Lords, and then departs; who having had Conference with the Commons, conclude of a Message to be sent to the Ambassadors, (either by requiring an account of the matter or confining of them) the Persons to be sent, the two Speakers of both Houses, with some convenient number of

of either, having their Maces, or Ensigns of Offices born before them to the Ambassador's Gates, and then forborn; and then requesting Speech with them, let them know, that a Relation being made that Day, in open *Parliament* of, &c. they were deputed from both *Houses*, the great Council of the Kingdom, to the which, by the Fundamental Laws of this Nation, the chief Care of the King's Safety, and the publick Peace and Quiet of the Realm is committed; and that they were no less the *High Court of Justice*, or *Supersedeas* to all others, for the examining and punishing all Attempts of so high a nature, &c. if it carry truth; and having executed their Commission, conclude that the Houses, to shew that reverence which they bear unto the Dignity of his *Master* by their *Message*, declare that they two, who are never employed but to the King alone, were at that time sent, &c. and if the Houses shall upon return of their *Speakers* conceive their Answers (if it be a Matter that requires it) are such as may justly deserve their being confined, they then make an address to his *Majesty* to confine them to their Houses, restraining their departure till the Prince or State, whom they represent, be acquainted with their offence: And so it was done in 44 H. 3. to the Pope's Legates in England, and 28 E. 1.

XII. If a Foreign Ambassador, being a *Prorex*, commits here any Crime which is *contra Jus Gentium*, as Treason, Felony, Adultery, or any other Crime which is against the Law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be

The *Parliament* not sitting, the Secretaries of State may signify the like, if occasion, &c.

The opinion of the Lord Coke, 4 *Instit.* fol. 153, &c.

punished here as any other private Alien, and not to be remanded to his Sovereign but of courtesy.

XIII. But if any thing be *malum prohibitum* by any Act of Parliament, private Law, or Custom of this Realm, which is not *malum in se Jure Gentium*, nor *contra Jus Gentium*, an Ambassador residing here, shall not be bound by any of them; but otherwise it is of the Subjects of either Kingdom; for if a French Merchant or Spanish Merchant trades or imports any prohibited Goods, he must at his peril observe the Laws of England; and so it was adjudged *Pasc. 33 Eliz.* in the *Exchequer, Tomlinson, quitam versus Henry de Vale & al.* upon the Statute of 19 H. 7. Cap. 21. but if an Ambassador imports any prohibited Goods, *è contra*.

Jovius, fol.
125.

The Florentines, having sent Ambassadors to Charles the Fifth and Clement the Seventh, being then at *Bolonia*, together with their Household-stuff, they brought covertly many rich Commodities to sell and traffick with, supposing that they might be free from paying the Gabel; but the Searchers of the Custom-house having discovered it, they became objects of laughter and mirth to the *Bolonians*, and for that, as unworthy of the Office of Ambassadors, were remanded home without Audience.

Sir Thomas Challoner, having been sent Ambassador to Spain by Queen Elizabeth, remitted a Complaint to the Queen, that his Chests had been searched: Upon which the Queen demanded the opinion of her Council in the point, who upon the whole matter resolved the Action into this, *Legato omnia æqui bonique ferenda dummodo Principis Honor non directe*

directè violetur, the very words of Mr Camden, An Ambassador must bear all things patiently, provided that the Honour of the Prince (whom he serves) be not directly violated.

XIV. The Office of an Ambassador does *Leg. si F. de* not include a protection private but publick, *lega. in aut.* for the King his Master, not for any several *de sanctiss.* Subjects, otherwise than as it concerns the *§. rerum, coll.* King and his publick Ministers, to protect ^{9.} them, and procure their protection in foreign Kingdoms, in the nature of an Office and *Negotiation of State*; therefore their Quality is to mediate and prosecute for them or any one of them, at the *Council-Table*, which is as it were a *Court of State*; but when they come to settled Courts, which do and must observe essential forms of Proceeding, *scil. processus legitimos*, they must be governed by them: And therefore in the Case of *Don Lord Hobart, Diego Serviento de Acuna, Ambassador Lieger* *sol. 78. Sed* for the King of Spain, who libelled in the *Vide Cro. El.* *Admiral Court as Procurator-General* for all *685. Yelv.* his Master's Subjects, against one *Jolliff* and *Hard. 183.* *Tucker*, and Sir *Richard Bingley*, for two *1 Sid. 320,* Ships and their Lading of divers kinds, of *367. 2 Saund.* the Goods of the Subjects of the King of *260. 2 Lev.* Spain generally, and not naming of them *25. 1 Ven.* *173, 208.* *adduct ad Port de Munster*, in the Preface of the Libel generally against them all, and then proceeds and charges them severally thus; That *Jolliff* and *Tucker* Captain *Pirate*, *in alto Mari bellicè dictas Naves aggressi sunt,* & *per vim & violentiam* took them, and that they were *adductæ in partes Hiberniæ*, and that coming into the hands of Sir *Richard Bingley*, he converted them to his own use, (not saying where) and refusing to render them

them being required, it was there held that a *Prohibition* should go, for the matter is Triable merely at the *Common Law*, and that such a *Procuracion* was not good, though to an Ambassador.

Don Alfonso de Valesco, Ambassador from the *Catholick King*, attached *Tobaccoes* at Land here, which one *Corvera*, a Subject of the King of *Spain*, brought higher, and the Ambassador by his *Libel* supposed to belong to his Master, as Goods confiscated, as all other his Goods were. Sir *John Watts*, the Plaintiff in the suggestion, prayed a *Prohibition*, which was granted accordingly, for the Property of Goods here at Land must be tried by the *Common Law*, however the Property be guided; and it was likewise ruled, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiscated before, the Property shall not be questioned but at the *Common Law*, *Don Alfonso vers. Corvera*, Mich. 9. Jac. Hob. 212. Hill. 9. Jac. upon the like *Libel* by *Don Pedro Sureza* Ambassador for *Spain*.

* *Distingui-
ferme hac in re
solent crimina.
Vide Parutam,
lib. 10. ubi
Rex Gallie
hanc ob causam
iratus pacatur:
Vide eundem,
lib. 11.*

† *Grot. de
Jure Belli ac
Pacis, lib. 18.
§. 4, 5, 6, 7.*

XV. Whether an Ambassador hath Jurisdiction over his own Family, and whether his house be a *Sanctuary** for all that fly into it, depends upon the concession of him with whom he resides, for this belongs not to the Law of Nations†; and it hath been seen, that an Ambassador hath inflicted punishment on his own Servants and Vassals, as the *Muscovite* did here in *England*; but that must be purely by concession, as the *Turk* permits it to the *English* Ambassador at *Constantinople*; But Fugitives that fly into their Houses, nay, their own Servants if they have greatly offended, cannot be drawn out by force,

force, without a Demand and Refusal; which when done, it is then become as an offence in them.

XVI. Most certain by the *Civil Law*, the moveable Goods of an Ambassador, which are accounted an accession to his Person, cannot be seized on, neither as a pledge, nor for a payment of a Debt, nor by *Order* or *Execution of Judgment*; nor by the King or *States* leave where he resides (as some conceive) for all coercion ought to be far from an Ambassador, as well that which toucheth his necessities as his Person, that he may have full security; if therefore he hath contracted any Debt, he is to be called upon kindly, and if he refuses, then Letters of *Request* are to go to his Master*; so that at last that course may be taken with him as with Debtors in another Territory; to some this may seem hard, yet Kings, who cannot be compelled, want not Creditors; but the Lord *Coke* seems to be of another opinion†, for as to Contracts and Debts that be good *Jure Gentium*, he must answer here.

*Rex facis me-
tu regium nun-
tium populi Ro-
man: Quiritum
vasa comitesq;
meos: yet an
Ejectment
hath been
brought and
left at the
House of the
Ambassador,
and it was al-
lowed good,
and conceived
no breach of
their privi-
lege in the
Case of Mons.
Colbert for
York House,
Mich. 28 Car.
2. in Banc.
Reg.
• Grotius lib.
2. cap. 18.*

† *Coke. 4. Instit. fol. 153.* Certain it is, that none dareth presume to meddle either with their Persons, Goods, or Servants, without leave had, the contempt of which hath been punished with Imprisonment. *Lucas 4. Vid. Stat. 7. A. cb. 12. §. 5.*

XVII. If an Ambassador commits any private *outrage* against one of the Prince's Subjects with whom he resides, unless it be to defend the Dignity of his Charge, or of his Master, it hath been conceived by some not to be justifiable before the Prince with whom he resides; (say they) there is a great difference between the *Dignity*, and *Authority* of the Prince in the Country of another Sovereign, for he may well retain his *Dignity*,
but

but not his *Authority*. Usually Injuries of that nature being done, they have admitted debates at a *Council of State*, where the Sovereign, with whom the Minister of State hath resided, being satisfied, that Reparation ought to be made to the party injured, he hath been ordered, or at least requested, to comply with the same.

XVIII. But, on the other hand, if any private *outrage* be committed by the Subjects of that Prince with whom he resides, upon his Person, the Offenders may be subjected to punishment. The Queen of Sweden having made the incomparable *Grotius* (after he had escaped by Providence out of Prison, and by a greater from his *Countrymen*) her *Barkseate* in Ambassador with *Lewis* the Thirteenth, with whom he resided at *Paris*, coming one day from *St. Germain*s, the *Secretary of Ceremonies* being in the Coach with him, it chanced that, in one place as they passed, a great number of People were in the way seeing of an Execution, his *Postilion* and *Coachman*, driving boldly through the Company, the *Archers* then attending the Execution with short Pieces, (concerned somewhat angrily that the Execution was disturbed) made after the Coach, shot his *Postilion* and *Coachman*, and through the Coach, even through his Hat: The matter coming to be examined, the King ordered three or four of them to be hanged, but that Good Man first pardon-ed them himself, and then obtained the King's.

XIX. The Republick of *Venice* employeth generally more Ambassadors abroad than any other State, and they are as those of other Princes be, *Ordinary* and *Extraordi-nary*; the Commission of the Ordinary con-tinueth

tinueth for three Years; but he who resides at *Constantinople* is not called Ambassador, but *Bailio*, residing there perpetually; and that Republick allows him a greater Provision to support his Grandeur, than to any other; and by the Laws of *Venice*, whatsoever he expends is allowed him upon his accounts without any examination; the which no other of their publick Ministers of State have like privilege.

By the Laws of *Venice* there can be no extraordinary Ambassador employed, unless they have been Ambassadors formerly, and upon their return are strictly examined of their Comportment in their Legation, and are to discover what presents they have received from the Prince or State to whom they were sent, the concealment of which is of a very dangerous consequence.

Bodinus de Repub. lib. 3.

Nor may any of their Ambassadors receive any Preferment from any other State during their Legation. The *Patriarch of Aquileia* dying, *Hermolao Barbaro* being there Ambassador for that Republick, the Pope conferred on him that Ecclesiastical Dignity, and made him a Cardinal; which being known at *Venice*, notwithstanding he was a Person of great Merit, and had given notice to the Senate, rich, well allied, and had good Friends, they sent express command that he should resign the *Patriarchship*, otherwise they would take from his Father the *Procuratorship* of *St Mark*, and confiscate all his Estate.

Jac. Aug. Thuanus, l. 27. in Vita Augustini Barbado Duke of Venice, Anno 1486.

But if such Ambassadors have received any Present, Gift, or Reward, from any Foreign Prince or Republick, and such Ministers of State are thought worthy of retaining the same, such a Grace must pass by the Suffrage

Paulus Parisius in Hist. Ven. lib. 7.

frage

frage of the Senate, to oblige them more to the benevolence of the Republick, than to the bounty of any Foreign Prince. The consideration of which put the same generous scruple into the Breast of Sir *Amias Paulet*, who returning from his Ambassy in France, would not at his departure receive from the French King the Chain of Gold which is given of course, till he was half a League out of Paris. But more famous was the action of Sir *Leoline Jenkins*, the English Ambassador at Nimeguen, who, tho' after the Treaty concluded, absolutely refused the French King's Present.

Francis Hotte-
man, fol. 23,
24.

XX. By the Laws of Nations, in the Reception of Ambassadors, those from a King are generally introduced by an Earl or Count, those from a Duke or Republick by a Baron; nor are they to be allowed that Honour but only at their first and last Audience.

XXI. Prophane Histories are full of Wars, because of wrong done to Ambassadors; and in the sacred Story is extant the memory of the War which David upon that Ground waged against the Ammonites; nor doth *Cicero* esteem any Cause more just against *Mithridates*; and at this day not only *Lawyers*, but *Divines*† are all of the same opinion, That a War cannot be more justly commented than for the Violation done to their Publick Ministers.

* Grot. l. 2.
c. 18. §. 11.
† Montague's
Acts and Mo-
numents,
fol. 450.

XXII. The Privileges of Ambassadors and their Servants, as to civil Suits, by the Law of England.

In respect to civil Suits, all the foreign Jurists agree, that neither an Ambassador, nor any of his Train or *Comites*, can be prosecuted for

Black. Com.
254, 255, &c.

for any Debt or Contract in the Courts of that Kingdom wherein he is sent to reside. Yet Sir Edward Coke maintains, that, if an Ambassador make a Contract which is good *jure Gentium*, he shall answer for it here. But the Truth is, so few Cases (if any) had arisen, wherein the Privilege was either claimed or disputed, even with regard to civil Suits, that our Law Books are silent upon it. Previous to the Reign of Queen Anne, when an Ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken out of his Coach in London, for a Debt of fifty Pounds, which he had there contracted: Instead of applying to be discharged upon his Privilege, he gave Bail to the Action, and the next Day complained to the Queen: The Persons who were concerned in the Arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same Time sworn a Member) and seventeen were committed to Prison, most of whom were prosecuted by Information in the Court of Queen's Bench, at the Suit of the Attorney-General; and at their Trial before the Lord Chief Justice were convicted of the Facts by the Jury, reserving the question of Law, how far those Facts were criminal, to be afterwards argued before the Judges; which question was never determined. In the mean Time the Czar resented this Affront very highly, and demanded that the Sheriff of Middlesex, and all others concerned in the Arrest, should be punished with instant Death. But the Queen (to the Amazement of that despotic Court) directed her Secretary to inform him, "that she could inflict no Punishment upon any, the meanest of her Subjects, unless

4 Inst. 153.

21 July 1708,
Roger's An-
nals of Queen
Anne.

25 July 1708,
ibid.

Mr. Whit-
worth.

unless warranted by the Law of the Land, and therefore was persuaded that he would not insist upon impossibilities." To satisfy however the Clamours of the foreign Ministers (who made it a common Cause) as well to appease the Wrath of *Peter*, a Bill was brought into Parliament, and afterwards passed into a Law, to prevent and to punish such outrageous insolence for the future. And with a Copy of this Act, elegantly engrossed and illuminated, accompanied by a Letter from the Queen, an Ambassador Extraordinary was commissioned to appear at *Moscow*, who declared, "That though her Majesty could not inflict such a Punishment as was required, because of the Defect in that particular of the former established Constitutions of her Kingdom, yet, with the unanimous consent of the Parliament, she had caused a new Act to be passed, to serve as a Law for the future." This humiliating Step was accepted as a full Satisfaction by the Czar, and the Offenders, at his Request, were discharged from all farther Prosecution.

This Statute recites the Arrest which had been made, "in Contempt of the Protection granted by her Majesty contrary to the Law of Nations, and in Prejudice of the Rights and Privileges, which Ambassadors and other publick Ministers have at all Times been thereby possessed of, and ought to be kept sacred and inviolable:" Wherefore it Enacts, that for the future all Process, whereby the Person of any Ambassador, or of his Domestic or Domestic Servant, may be arrested, or his Goods distrained or seized, shall be utterly null and void, and the Persons prosecuting, soliciting, or executing such Process, shall be deemed

deemed Violaters of the Law of Nations, and Disturbers of the publick Repose, and shall suffer such Penalties and corporal Punishment, as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit: But it is expressly provided, that no Trader, within the Description of the Bankrupt Laws, who shall be in the Service of any Ambassador, shall be privileged or protected by this Act; nor shall any one be punished for arresting an Ambassador's Servant, unless his Name be registered with the Secretary of State, and by him transmitted to the Sheriffs of *London* and *Middlesex*. Exceptions that are strictly conformable to the Rights of Ambassadors, as observed in the most civilized countries. And, in consequence of this Statute thus declaring and enforcing the Law of Nations, these Privileges are now held to be part of the Law of the Land, and are constantly allowed in the Courts of Common Law.

The Courts of Common Law have come to the following Resolutions, upon Application, on the said Act.

That it is not necessary the Party should live in the Ambassador's House, 2 *Stra.* 792. 2 *R. Raym.* 1524. *Fitzgib.* 200. *pl.* 12.

When Party comes for Benefit of the Act, it is not enough that he be registered in the Secretary's Office as a Servant, but must shew the Nature of his Service, that the Court may judge whether he be a Domestic Servant within the meaning of the Act of Parliament, *Fitzgib.* 200. *pl.* 12. 2 *Stra.* 797.

A Trader, an Annuitant, a Justice of Peace, a menial Servant, an hired Clerk, a Person who receives no Wages, a Courier, a Messenger, a Landwaiter at the Custom-house,

denied the Benefit of the Act. *Fitzgib.* 200. *pl.* 12. 2 *Stra.* 797. *Pract. Reg. C. P.* 14. *Barnes's Notes, C. P.* 264, 271. *Rep. and Cas. of Pract. C. P.* 65, 134, 272. *Barnard, K. B.* 401. *Bur. Rep.* 401.

The Party must serve in the Capacity he was hired, *Barnard, K. B.* 401. where a Person does not execute the Office which he has his Testimonial for, but only gets himself entered in the List to have the Benefit of a Protection, the Court will not suffer it. *Barnard, K. B.* 79.

Abr. Eq. 350. One protected by the *Genoese* Ambassador brought a Bill in *Chancery*, and was ordered, *pl.* 4. *Goodwin* and *Archer*, though after (1) Answer put in, to give *Pasch.* 1729. (2) Security to answer the Costs, in the same manner as if he were a Foreigner; because, *2 Will. Rep.* 452. by the above Statute, all Proceedings against Ambassadors and their Servants are made void; And a like Order said to be made by my Lord *Cowper*, after so that if the Bill should be dismissed, no Proceedings could issue against him.

Answer put in, *Trin.* 1709, between *Barret* and *Burk.* (1) But it has been denied in the *Exchequer, Bunb. Rep.* 183. *pl.* 258. and so it has in that Court, even before Answer; where the Bill was for an Injunction to stay the Defendant's Proceedings at Law in Ejectment; because the Plaintiff was in a manner forced into this Court, (*viz.* the *Exchequer*) and did not come in originally. *Bunb. Rep.* 272. *pl.* 340. If the Motion be before Answer, the Defendant will not be obliged to put one in, until the Plaintiff give Bond, with a Surety to the Senior Six-Clerk, not towards the Cause, in 40*l.* Penalty for answering Costs. *2 Will.* 452. *pl.* 142. *Mosely* 7. 175. *pl.* 89. (2) A Deposit in Money will not be permitted instead thereof. *Bunb. Rep.* 351. *pl.* 53.

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C H A P. XI.

Of the Right of delivering Persons fled for Protection.

- I. *Where Superiours may become culpable for the Crimes of their Subjects.*
- II. *Offences by whom properly punished, whether by the injured State, or they into whose Territory the Offender is fled.*
- III. *Whether Kingdoms and States ought to deliver up Fugitives, if required, or not.*
- IV. *Where Persons are fled, the places whither they come, ought to be Asylums.*
- V. *How distinguished, and when to be punished or delivered.*
- VI. *Whether an innocent Man may be deserted and delivered up to the enraged Power that demands him.*
- VII. *Whether an innocent Person may be deserted and yielded, if War be threatened.*
- VIII. *Whether an innocent Person refused to be delivered up, ought to yield himself.*
- IX. *If Charity in an innocent to yield himself, whether Compulsion may be used if he refuses.*
- X. *Whether this of delivering up does extend to Sovereign Princes driven out of their Country.*
- XI. *Persons running away with the Publick Revenue, where their Persons and Goods have been seized till reparation and satisfaction be made.*

I. **F**ATHERS are not bound for the fault of their Children, nor Masters for those of their Servants; nor Princes for the Actions of their Subjects, unless they become partakers in the Crime; the which may be done in two respects, by sufferance and receipt; therefore if Princes shall suffer or countenance their Subjects, by Pictures or Libels, or otherwise, to abuse another Nation or Commonwealth,

Zeno interceding for the Magnets to T. Quintus, and the Legates with him besought them with tears: *ne unius amentiam civitati assignarent, suo quemque*

periculo facere, monwealth,
Liv. l. 40.

it is the same as if they should authorize it. *Brutus to Cicero, How can you make me guilty? Yes, well enough, if it were in you to hinder it;* but receipt may admit of some further scrutiny.

II. *Commonwealths* being instituted, it was agreed that Faults of Particulars, which do properly belong to their own Society, should be left to themselves and their Sovereigns, to be punished or connived at, as they judged most fit.

Yet that *Right* is not so absolutely left to them, but Offences, which tend to the Destruction of Society or Government, whereof *Treason* is the chiefest, may seem to be excepted; for if a Subject shall commit an Act tending to the Subversion of his Sovereign's Government, the same is an Offence that's subject to an *universal Punishment*, i. e. it is to be punished every where; and the Governors into whose Territory such fly, seem to have a Right of prosecuting for the Offence: In Civil Actions, which tend to Commerce that supports Society, the Subjects of foreign Nations, having justly contracted Debts in their own Country, may obtain Justice in another; by a stronger Reason it is thought, that Princes or Republicks, that have received publick Injuries, have Right to require Punishment for the Indignity that is offered them, at least for that which tended to the Subversion of their Government, and to have the Offenders delivered up.

Roll's Abridg-
ment, fol.
530. Weyer's
Case.

For the
knowledge
of the Cause
ought to pre-
cede the Red-
dition; *non*
debet homines

III. The Question is illustrious, Opinions grounded on several great Precedents have been both ways produced: It hath been generally held, That those Kingdoms where the Offenders are fled ought to do one of the two,
either

either punish them according to their Deserts *dedere causa*
 being called upon, or leave them to the Judgment *non cognita.*
 of the offended State; others on the contrary; *Plutarch in*
 most certain it is, by the delivering up is under- *his Romulus.*
 stood, to leave him to the legal Judgment
 of that Prince or State, whom he hath offend-
 ed: And such was the Declaration of *Ferdi-*
nand King of *Spain*, who had been often re-
 quested by *Henry* the Seventh, to deliver up *Attainted by*
Edmond de la Pool Earl of *Suffolk* his Subject, *Act of Par-*
 then fled for Protection to that Prince's Coun- *liament 12 H.*
 try, but was always refused; but being *7. Co. Inst.*
 continually importuned by Promises that he *fol. 180.*
 should not be put to Death, caused the Earl
 to be delivered up to him, who kept him in
 Prison, and construing his promise to be per- *Herbert's*
 sonal to himself, commanded his Son *Henry* *Hist. H. 8.*
 after his Decease to execute him, who in the *Pepin* receiv-
 fifth Year of his Reign in cold Blood performed *ed, and would*
 the same. But the Malice of that politick *not deliver up*
 Prince the Father, and the uncontrollable *those that*
 Will of the Son, are Precedents but of small *fled to him*
 Force; the Example of which, not long after, *out of Neu-*
 gave the *French King* occasion to beware of *aria, oppress*
 trusting the latter with a Subject of his on the *by Tyranny.*
 like occasion; for *Cardinal Pool*, not many *Fredegar in*
 Years after, coming Ambassador from the *reb. Pep. An.*
Pope to the *French King*, they both being *1188.*
 then in Amity, and *Henry* the Eighth in
 League with the latter, but in Enmity with
 the first, requested to have the *Cardinal* deli-
 vered up, but could not prevail, being doubly
 armed, as the Ambassador of a Sovereign
 Prince, (for such is the *Pope*) and in the Ter-
 ritory of a foreign State.

The *Israelites* required of the *Benjamites* to
 deliver up the wicked Men; the *Philistines*,
Samson. *Cato* gave his Vote that *Cæsar* should

be delivered to the *Germans*, for spoiling them without just Cause. Nor are innocent Persons injured, if they are either delivered up, or punished; yet does it not thence follow that they must be delivered up or punished; The *Romans* delivered up those that had done Violence to the *Carthaginian* Ambassadors; yet the Ambassadors of the *Abassines* having been traiterously murdered by one of the Templars at *Jerusalem*, the Offender being demanded, that so Justice might be executed on him for the Act, the *Grand Master* answered, That he had already enjoined him Penance, and had directed him to be sent to the *Pope*, but absolutely refused to deliver him up.

Tyrus, lib. 20.
cap. 23. Anno
1173.

¶ Yet out of Churches beyond Seas for private Offences, which are universal Sanctuaries, the Offenders have been taken: In *Lucitania*, *Ferdinand* Lord Chamberlain was taken by Force out of the Church and burnt, for forcing a Noble Virgin. *Mariana, lib. 11.*

IV. But then, and as in this last, so in all other, the Offender must have committed some publick Offence *, as Treason; for most certainly it extends not to private Injuries, because there is no Precedent that ever a War was begun for such, though they may contribute much, but for those which tend to the Subversion or Ruin of a Country, they often have been delivered up; *Jugurtha* of *Bocchus* in *Sallust*, So shall thou at once free us from the sad necessity of prosecuting thee for thy Error, and him for his Treason. And by most Writers it is agreed, that such Offenders must either be delivered up or punished, the Election is left to their Choice, into whose Territory they are fled; though some have held, that in case of Protection or Sanctuary for such unfortunate Persons, Princes do make their Countries *Assylums* †.

T. Quintus

Charles Duke of *Burgundy* delivered up to *Lewis* the Eleventh, the Earl of *St. Paul*, Constable of *France*, who flying to some of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his Peace with the King; but the Duke,

Duke, after he had him in Custody, delivered him to the King of France, who immediately after cut off his Head. *Phil. Comines, l. 4. c. 12.*

† *Ludovicus Pius* the Emperor received those that fled to him from the *Roman Church*, as appears by his Decree, *Anno 817*, and *Luther* himself did not want Princes to protect him from the Fury of *St. Peter's Chair*. *Vide his Colloquiums.*

T. *Quintus Flaminius* sent Ambassador to *Prussias* King of *Bythinia*, for the procuring the delivering up the brave but unfortunate *Hannibal*, who accordingly being seized on, I will now, says he, deliver the Romans of that Fear which hath so many Years possess'd them; that Fear which makes them impatient to attend the Death of an old Man: This Victory of *Flaminius* over me, who am disarm'd and betrayed into his Hands, shall never be number'd amongst the rest of his Heroical Deeds: No, it shall make it manifest to all the Nations of the World, how far the antient Roman Virtue is degenerate and corrupted; for such was the Nobleness of their Forefathers, as when *Pyrrhus* invaded them in Italy, and was ready to give them Battle at their own Doors, they gave him Knowledge of the Treason intended against him by Poison; whereas these of a latter Race have employ'd *Flaminius*, a Man who hath heretofore been one of their Consuls, to practise with *Prussias*, contrary to the Honour of a King, contrary to his Faith given, and contrary to the Laws of Hospitality, to slaughter or deliver up his own Guest. Then took a Draught of Poison, and died.

Sir Walter Raleigh's Hist. Vol. 11. p. 781. Edit. 1736.

V. Though Kingdoms and States are look'd upon as places of Refuge; yet that must be understood for those that are persecuted with causeless Hatred, not to such as have committed that which is injurious to human Society, or to other Men. *Gillippus* the *Lac-*

Lib. 13. nian in *Diodorus Siculus*, speaking of the Right of such miserable Fugitives, saith, *They that introduced these Rights at first, meant the Unfortunate should expect Mercy, the Injurious Punishment*—After—*These Men, if by the unjust Desire of that which is another's they have fallen into these Evils, must not accuse Fortune, nor impose on themselves the Name of Suppliants, for that by Right belongs to them that have an innocent Mind and adverse Fortune.*

Carum occidisti, dum vis succurrere: nullum Crimen habes; manus est ibi purior, ac fuit ante.

But the Life of those Men full of wicked Acts, shut up against them all Places of Refuge, and leaves no room for Compassion. Cicero hath a Saying out of Demosthenes: We must shew Compassion to those whom Fortune, not their own evil Deeds, hath made Miserable. And by the holy Law, when any one had been slain by an Axe slipping out of another's Hand, the Cities of Refuge were open: The most holy Altar itself was no Protection for those that had slain an innocent Man maliciously, or had troubled the Commonwealth; which Law Philo explaining, saith, Unholy Men have no Entertainment in the Holy Place. Lycurgus the Orator relates that one Callistratus, having committed a Capital Fault, and advising with the Oracle, received Answer, That if he went to Athens he should have Right: And thereupon, in Hopes of Impunity, he fled to the most holy Altar there, notwithstanding which he was taken from thence, and put to Death by the City most observant of her Religion, and so the Oracle was fulfilled. Princes indeed (saith Tacitus) are like Gods, but neither do the Gods bear the Prayers

Prayers of Supplicants unless they be just. Such then are either to be punished or delivered up at least; yet surely this hath been observed to extend only to those Crimes that touch the State, or at least are of a very heinous Nature; sometimes they are expressly stipulated by Leagues to be delivered up; however this is to be observed, that such sort of Fugitives and Supplicants, be they Foreigners or Subjects, are to be protected till they have been fairly tried; and if that whereof they are accused, be not forbidden by the Law of Nature or Nations, the Cause must be tried and adjudged by the Municipal Laws of that Kingdom or State from whence the Crime doth arise. From which it may be observed, that a Fault committed in *England*, and the Person flying, and Request made; yet, by Reason that none can by the Laws of that Nation be tried but *per Pares*, nor then but in Person; it will thence follow, that such may seem out of the general Rule: However, it may stand with the highest Reason, that the Fact and Proof being remitted over with the Request, there may appear a just Ground for the Demand.

They of *Holland* lately delivered up the famous poisoning Cook that had been in the wicked Conspiracy with the Countess of *Saiffus* in *France*.

VI. Whatever the Opinion of those Writers have been, the Practice of latter Ages hath seemed to incline otherwise. Queen *Elizabeth* demanded *Morgan* and others of her Subjects fled into *France*, that had committed Treason against her; the Answer of the *French* King was, *Si quid in Gallia machinarentur, Regem ex jure in illos animadversurum; sin in Anglia quid machinati fuerint, Regem non posse de eisdem cognoscere, & ex jure agere; omnia Regna profugis esse libera; Regum interesse, ut sui quisque Regni libertates tueatur, imo Elizabetham*

34 Eliz. Cam-
den, fol. 35.
Vide Camb.
Anno 1585.

*tham non ita pridem, in suum Regnum Mount-
gumerium, Principem Condaem, & alios à Gente
Gallica admisisse, &c.* and they were never
delivered up; but the like was not returned
by the King of Scotland, for he promised that
he would transmit *Ferniburst* and the *Chancellor*
too, if they were convicted by a fair Trial.

Liv. lib. 22.
cap. 37.

Perseus King of *Macedon*, in his Defence to
Marius, speaking of those that were said to
have conspired against *Eumenes*: So soon as I
was admonished by you, and finding the Men in
Macedonia, I commanded them away, and
charged them never to return into my Dominions.

Anno 1660.
In the Alli-
ance between
those Crowns
Feb. 13, 1660,
provided for
in the fifth
Article.

The Cry of the Royal Martyr's Blood, justly
procured them of *Holland* to deliver up the
Regicides to the injured Successor. And from
the Crown of *Denmark* it was expressly stipu-
lated they should be delivered in these Words:

*Item quod si qui eorum qui rei sunt illius nefandi
Parricidii in Regem CAROLUM Primum
beatissimæ Memoræ admissi, ac legitime de eodem
scelere attingi, condemnati, vel convicti, &c.*

" If any of them who are guilty of the horrid
" Murder committed upon King *CHARLES*
" the First of Blessed Memory, be either
" now in the Dominions of the King of *Den-*
" *mark* and *Norway*, or shall hereafter come
" thither, that as soon as it shall be known
" or told to the King of *Denmark*, or any of
" his Officers, they be forthwith apprehend-
" ed, put in safe Custody, and sent back into
" *England*, or be delivered into the Hands
" of those whom the King of *Great-Britain*
" shall order to take charge of them, and
" bring them home."

That politic
Princes
Queen *Eliza-*
beth, gave the

VII. Most certain it is, if War be threatned
to a Nation or People, if they deliver not
up the Offender, tho' perhaps he is innocent,
and

and that such is the Malice of his Enemies, that they know they will put him to death, yet he may be deserted, especially if that Nation or Kingdom is inferior to others; but then the same ought not to be done rashly. The *Italian* Foot that forsook the unfortunate *Pompey* before all was lost, being assured of Quarter from the victorious *Cæsar*, were condemned by most that reported the Story of that day.

Scots a more equitable answer, when they demanded *Botwell*; she answered, that she would either render him up, or send him out of *England*, *Camden*, *Anno* 1593.

Pope Alexander (in the mortal Feud between him and the Emperor *Frederick*, who favoured *Octavian* the *Antipope*) fled disguised to *Venice*, the Duke and Senate being jealous that the *Emperor* would demand him, sent an Embassy to the *Emperor* to endeavour a Mediation and Peace, which was no sooner offered, but the *Emperor* broke out into a Rage, bidding them go home, saying, "Tell your Prince and People, that *Frederick* the Roman Emperor demands his Enemy, who is come to them for Succour, whom if they send not presently bound hand and foot, with a sure Guard, he will proclaim them Enemies to him and the whole *Empire*, and that there is neither Alliance or Laws of Nation which shall be able to free them from revenge for such an Injury, to prosecute which he is resolved to overturn all divine and human Laws, that he will suddenly bring his Forces before their City, and contrary to their expectation plant his Victorious Eagles on the Market-place of St. Mark." This Message being faithfully

delivered, the Senate decreed Arms, Arms; and while they were preparing, News was brought that *Otho*, the Emperor's Son, and General of the *Cæsarean* Fleet, was entered

Hisp. Rip.
Ven. In Vita
Sebastiani
Cyani Duke of
Venice, Anno
1164.

the

the *Gulph* with seventy-five Gallies; the most valiant and religious *Sebastiano Cyani* resolved to meet him, and having encountered them on the Coast of *Istria*, defeated *Otbo* and all his Naval Forces, taking forty-eight Gallies, *Otbo* their Admiral, and the rest either burnt or destroyed; he returned in Triumph for *Venice*, and not long after *Frederick* became convinced, that *Heaven* fights the Battles of the Innocent, and on his Knees begged Pardon of *Alexander* the Fugitive Pope.

Lewis the Eleventh of *France* required by Ambassadors of *Philip* Duke of *Burgundy*, the delivering up of *Sir Oliver de la Marche*, (who being a *Burgundian*, had wrote (as was conceived) somewhat against the Claim of the *French* to several Territories) upon a publick Audience at *Lisle*, they were answered by Duke *Philip*, That *Oliyer* was Steward of his House, a *Burgundian* by Birth, and in no respect subject to the Crown of *France*; notwithstanding if it could be proved, that he had said or done any thing against the King's Honour, he would see him punished according as his Faults should deserve.

VIII. But admitting that such an innocent Person ought not to be delivered up, whether he is bound to yield himself; by some it is conceived he ought not, because the nature of civil Societies, which every one hath entered into for his own Benefit, doth not require it; from which it follows, that though such Persons are not bound to that by Right, properly so called, yet it doth not follow, but in charity he seems bound to do it; for there may be many Offices not of proper Justice, but of Love, which are not only performed with Praises, but also cannot be omitted.

ted without blame; and such indeed is the Act of such a Person's voluntary yielding up himself, preferring the Lives of an innocent Multitude before his own. Cicero for P. Sex-
tus, If this had happened to me sailing with my Friends in some Ship, that Pirates surrounding us should threaten to sink us, except they would deliver me, I would rather have cast myself into the Sea to preserve the rest, than to bring my Friends either to certain Death, or into great danger of their Life.

Idem de finibus 3. Vir bonus & sapiens, & Legibus parrens, & civilis officii non ignarus utilitati omnium plusquam unius alicujus, aut suae consulit. And in Livy there is a most excellent Saying of some Molossians: *Equidem pro Patria qui lethum appetissent saepe fando audiui; qui patriam pro se perire aequum censerent, hi primi inventi sunt.* Liv. lib. 45.

IX. But whether such an innocent Person may be compelled to do that which perhaps he is bound to do, may be a question; rich Men are bound by the precept of Mercy to give Alms to the Poor, yet cannot be compelled to give: It is one thing when the parts are compared among themselves, another when Superiors are compared to their Subjects; for an Equal cannot compel his Equal, but unto that which is due by right strictly taken; yet may a Superior compel his Inferior to things which Virtue commands; in a Famine to bring out provisions they have stored up, to yield him * to Death that deserts his Colours, or turns Coward, to mulct those that wear excessive Apparel †, and the like. Phocion, pointing to his dear Friend Nicocles, said, *Things were come to that extremity, that if Alexander should demand him, he should think he were to be delivered up.* It hath seemed that such an innocent Person might be deserted and compelled to do that which Charity requires; but the late ROYAL MARTYR

* *Leg Desert.*

† *Coke Instit. 3. fol. 199.*

Plutarch Phocion: Fides

agi visa dedites non prodi.

Liv. l. 7. Statius judicemus esse paucos

aliquos mala

ferre, quam

immediam multitudinem.

seemed

The Son of seemed of another Opinion, when he came
Pompey was so to die, in the Case of the *British Protomartyr*
 worthy a Son of so great a *Strafford*.
 Father, that he contended with *Anthony* and *Augustus* about the *Em-
 pire of the World*; this *Pompey* entertaining *Anthony* and *Augustus* in his
Galley, the Captain which commanded it, demanded leave of him
 to weigh Anchor and to carry away his Guests, and to make his Ri-
 vals Prisoners: He answered him, that he ought to have done it with-
 out telling him of it, and should have made him great without hav-
 ing made him forsworn: Certainly an honest Person will never be of
 the Mind of this Captain; therefore in such extremities, *Counsellors*,
 either for high advantages, or in the great necessities of their *Prin-
 ces*, should serve their Masters with their Estates and Goods, but not with
 their Honour and Conscience.

12 H. 7.
Bacon's Henry
 the Seventh,
fol. 162.

X. But this delivering up does in no re-
 spect extend to Sovereign Princes, who are
 by Divine Permission unfortunately driven
 out of their own Country; and therefore
 memorable is the great Treaty, commonly
 called by the *Flemings*, *Intercursus Magnus*,
 where there was an express Article against
 the reception of the Rebels either of *Henry*
 VII. or of the *Arch-Duke of Burgundy* by
 others, purporting, that if any such Rebel
 should be required by the Prince, whose
 Rebel he was, of the Prince Confederate,
 that forthwith the Prince Confederate should
 by Proclamation command him to avoid the
 Country, which, if he did not within fifteen
 days, the Rebel was to stand proscribed, and
 put out of Protection. But a Prince, or one
 that hath a Sovereign Power, and had been
 contending for his Right, but Success not
 crowning his hopes, occasioned his flight,
 hath always been excepted; to deliver up
 such, is even against Nature and the Majesty
 of Power; and therefore it is very remark-
 able, what attempts were made for E. 4. H.
 7. nay, in the very Treaty of *Intercursus*
Magnus, it is memorable, that at that time
Perkin

Perkin Warbeck was contending with *H. 7.* for the Crown of *England*, by the name of *Richard Duke of York*, younger Son and surviving Heir Male of *Edward the Fourth*. My Lord *Bacon* does take a particular notice, that *Perkin Warbeck* in that very Treaty was not named nor contained, because he was no Rebel, but one that contended for the Title. Afterwards, when *Perkin* was fled into *Scotland*, and there received by the *Scottish King*, *Henry the Seventh* sent to have *Perkin* delivered up, and it was one of the principal Inducements of the King to accept of a Peace upon that condition, giving for an Argument, that *Perkin* was a Reproach to all Kings, and a Person not protected by the Laws of Nations; but the *Scotch King* peremptorily denied so to do, saying, *That he (for his part) was no competent Judge of Perkin's Title, but that he had received him as a Suppliant, protected him as a Person fled for refuge, espoused him with his Kinswoman, and aided him with Arms, upon the belief he was a Prince, and therefore he could not now with his Honour so unrip, and (in a sort) put a lye upon all that he had said and done before, as to deliver him up to his Enemies.* This was so peremptorily insisted on by the *Scotch King*, that *Henry the Seventh* was at length contented to wave the Demand, and conclude a Peace without that Article; notwithstanding the King of *Scotland* had often in private declared, that he suspected *Perkin* for a Counterfeit.

Lord Bacon's
Henry the seventh, fol. 176.

XI. Persons that have wronged or defrauded Kings of their Revenue, especially in *England*, upon Letters of Request to those

those Princes whither they have fled, have been delivered up.

Rott. Romæ

An. 4. E. 2.

M. 17. Dorfo.

Some *Florentine* Merchants of the Society of the *Friscobaldi*, being made Collectors and Receivers of the King's Customs and Rents in *England, Wales, Ireland, and Gascoigne*, running away with those Monies, together with all their Estates and Goods, for *Rome*, the King sent his Letters of Request to the *Pope*, desiring that they might be arrested, and their Persons and Goods seized, and sent over to satisfy him for the damages he and his Subjects had sustained by them, promising not to proceed against them to the loss of their Limbs or Lives. Upon which Letters, the *Pope* seized on their Goods, and not long after the King writ for the seizing of their Persons, for answering of other Frauds and Injuries.

Rott. Romæ 4.

E. 2. M. 16.

Dorfo.

The like was done for one *Anthony Fazons*, who had received 500*l.* of the King's Monies, and running away with it to *Lorraine*, the King writ to the same *Duke*, desiring that search might be made, and his Person seized upon, and his Goods secured in every place within his Territories, till he should satisfy the said 500*l.*

Claus. 8. E. 2.

M. 31. Dorfo.

pro Rege.

C H A P. XII.

Of Contribution paid by Places Neuter
to both Armies in War.

- I. *Of force used to Neuters whether lawful.*
- II. *Of Neuters, their duty considered in reference to either of the warring Parties.*
- III. *Considerations general touching the same, and the chief matters that are objected by those that scruple thereat.*
- IV. *The Case stated generally in the question propounded to our Saviour of paying tribute to Cæsar.*
- V. *In the payment of Contribution to an Enemy, what is necessary to be distinguished in the beginning of a War.*
- VI. *Of a second distinguishment drawn out of the first, of such payments, when a War is actually formed.*
- VII. *Where a man pays, but dislikes the cause, whether excusable, the War not yet actually formed in place.*
- VIII. *Where a Country is fully possess'd, whether payment then is lawful.*
- IX. *Of the state of those that live on Frontiers, their condition considered in reference to procure their Peace by Contribution.*
- X. *Of interdiction by him to Places from whom faith is owing, Contribution notwithstanding being paid, whether the same creates an offence in them.*
- XI. *Of the genuine Construction of such interdictions according to the true intention of the same.*
- XII. *Of the impunity and punishment that such innocent Offenders may be subjected to, in case of being questioned for the contempt by their right Governors.*

I. **I**T is manifest there is no Right of War over Neuters in War; yet because by occasion of the War many things are usually done against such (Borderers especially)

on pretence of necessity, there can be no Excuse for the act, unless it be apparent Necessity, and that the same ought to be extreme, for then it may give a Right over what belongs to another Man; for in such case, if the necessity be manifest, there may be such a proportion exacted as the necessity requires, that is, if the Custody suffices, the Use of the thing is not to be taken; if the Use, not the Abuse, be necessary, yet is the Price of the thing to be restored. *Moses*, when the highest necessity urged him and the People to pass through the Land of the *Idumeans*, first he saith, *he would pass along the highway, and not divert into their Corn-fields or Vineyards; if he had need but of their Water, he would pay a price for it.* The worthy Captains, both *Greek* and *Roman*, have done the like: In *Xenophon* the *Greeks* with *Clearchus*, promise the *Persians* to march away without any damage to the Country, and if they might have necessaries for Money, they would take nothing by force. This Virtue is often commended in * *Belisarius* by *Procopius* his Companion and Witness of his Actions.

* See to this purpose his excellent Speech to his

Soldiers near *Sicily*, when he marched into *Africk*, and the Narration of his March through *Africk*. *Vandal.* 1.

II. And as the Law doth preserve the Estates and Territories of such Neuters, or those that abstain from War, so on the other hand, such ought to do nothing for either Party, but especially for him who maintains a bad Cause, or whereby the Motions of him who wageth a just War may be retarded; and in a doubtful Case they ought to shew themselves equal (as we have mentioned elsewhere)

elsewhere) to both in permitting passage, in
 affording Provision for the Legions or Navies,
 and in not relieving the Beliged. *It is the*
duty of the Athenians, if they would not side
with any Party, either to prohibit the Corin-
thians from raising Soldiers out of Attica, or
permit them to do the like. So the Emperor
 and Confederate Princes of the Empire,
 with the Cantons of Switzerland in the late
 German War, and so of the King of Eng-
 land, who was so careful to preserve the
 Neutrality, that he issued forth his Procla-
 mations to prohibit all Persons, of what
 Condition soever, to become Soldiers in the
 Service of any of the warring Princes. It
 was objected by the Romans against Philip
 King of the Macedonians, That the League
 was violated by him two ways, both because
 he did injuries to the Fellows of the Roman
 People, and because he assisted the Enemy with
 Aids and Money. The same things are urged
 by Titus Quintus in his Conference with
 Nabis, Yet thou sayest, I have not violated
 you, nor your Friendship and Society, how
 often shall I prove the contrary? In short,
 wherein is Friendship violated? By these two
 things especially: *If thou hast my Friends for*
Enemies: if thou art a Friend to my Enemies:
he is reckoned an Enemy, who supplieth them
with what is useful for the War.

*Exemplum
nobile vide
apud Parn-
tam, lib. 8.
Thucydides, l.
1.*

Procop. Goth.

III. But now there are many things that
 are useful for the War worthy of some con-
 sideration, the which are not so accounted at
 this day by the Laws of Nations; under-
 stand me, That I call the *Laws of Nations*,
 which is at this day universally practised, as
 namely, the supplying either or both of the
 warring Parties with Monies, or that which

Sil. in Verb.
bellum p. 1.
n. 7. circa
finem.

is called *Contribution*. Now if the Minds of the Subjects cannot be satisfied by the declaration of the Cause, it will certainly be the Office of a good Prince or General, rather to impose upon them Contribution than Military Service, especially when that Prince or General hath an Army sufficient to prosecute his Designs, the which a just Commander may use as God doth the ready Service of the Devil.

The most excellent *Grotius* having most incomparably treated on, and cleared all the important Objections against a just War, together with the Incidents of the same; yet this main one of *Contribution*, or paying to both Armies, whether lawful, he hath not touched in any other words but these, *Quod sub tributo utrique parti præstando factum diu in Belgico, Germanico bello nuper vidimus,*

† *Grot. de Jure*
Bell. ac Pacis,
lib. 3. cap. 12.

§. 4. n. 2.
 * *Lib. 2.*

estque id consentaneum mori veteri Indorum †: and so cites a saying in *Diodorus Siculus* *, of the Peace that those People maintained in their Possessions by reason of such Contributions. But to many Persons this Instance, without further scrutiny, proves insufficient; for there are many, who not finding this Liberty in their Consciences, unnecessarily chuse rather to give up their Bodies to restraint, and to abandon their whole means of Subsistence in this World, both for themselves and their Children, (which ought not fondly to be done, *unless we would be worse than Infidels*, as *St. Paul* saith) they ground their Resolution on this Reason, that they know not whether the Monies they give may not furnish to the Destruction of many Innocents, and perhaps the just Magistrate; yea, and the total subversion and ruin of their

their Country, Liberty, and Religion: And therefore, though Men give and bestow their own where they please, yet in such Cases they may not; therefore it may not be impertinent to examine whether these be necessary Scruples in themselves, and such as admit of no exception of Liberty, or whether those Scruples be reasonable, or indeed meer scandal.

IV. The *Scribes* and *Pharisees* sought two ways to entrap Our Saviour; one was, if he had blasphemously taught a new Religion, and a new God, (*viz.* himself) they hoped the People would be provoked to stone him for this, according to the *Hebrew Law*: *Deut. xiii.* The other was, to bring him within the compass of *Treason*, as if he could not lead great Multitudes after him without traiterous Designs; but this Gin failed too, because the Multitudes which followed him were always ready to defend him. However, when he was at *Jerusalem*, where the *Roman Troops* and *Prætor* were, they thought they had him sure, by propounding this Subject to him:

Is it lawful to pay Tribute to Cæsar? Which was as much as to say, We who are descended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bathe ourselves in Rivers of Milk and Honey, to have full Barns and many Children; yea, that GOD himself would be adored in no other place of the World but at this our *Jerusalem*, and that abroad we should triumph over the *Barbarous* and uncircumcised World by virtue of that *Militia*, which he never ordered for any but ourselves; how are we then in Duty or Conscience to submit now to the Ord-

nances of the *Uncircumcised Romans*? Or what Right can he have to exercise supreme Jurisdiction over us, the privileged *Seed of Abraham*, by levying of Taxes on our Estates and Lands, which GOD himself laid out for us, by which means the *Emperor* and *Senate* hold this very Temple in slavery, and insult over our very Consciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood; which as they are the price of our Blood, and a Tribute far above *Cæsar's*, (payable in no other Place but this Temple, which GOD himself built) so our Blood ought not to seem too dear to be sacrificed for the Liberty of these: And though the *Roman State* could pretend, yet what can this *Cæsar* pretend. Every man's Conscience knows that it was but the other day he usurpt over the *Senate*, in which resides the true Jurisdiction of *Rome*; and if that were otherwise, yet how can he pretend to a Title unless Poison be a Pedigree, or violent Usurpation a just Election, by which he, who is but the greatest Thief in the World, would now pass for the most Sovereign and Legitimate Prince? How then are we in Conscience obliged to pay Tribute to this *Cæsar*? Though those Lawyers thought in there Consciences that they were not to pay it, and that *Our Saviour* likewise, as a *Jew*, thought so too; yet they supposed he durst not say so much in the crowd; nor yet deny it by shifting it off with Silence, lest the *Roman Officers* should apprehend him: But when *Our Saviour* shewed them *Cæsar's* Face upon the Coin, and bade them *Render to Cæsar that which was Cæsar's, and to GOD that which was GOD's*; His Answer ran quite

quite otherwise, not as some would have it, that by a Subtilty he answered not to the Point proposed, for then the sense of the whole Text would sound very ill in such Terms, *viz.* If there by any thing due to *Cesar*, pay him it; and if any thing is due from you to GOD, then pay it likewise: This had been a weakening of GOD's Right for *Cesar's*, and to have left a desperate doubting in a necessity: 'Tis beyond all cavil, that Our Saviour's Opinion was positive Matt. xxii. for paying of Tribute to that *Cesar*, because ^{20.} *de facto* he did pay it; and the plain Reason of it appears evidently in this his Answer: *Cesar's* Face was upon the Coins, that is to say, *Cesar* by Conquest was in Possession of that Coin, by possessing the place where he obliged them to take it; coining of Money ^{3 Instit. 16,} being one Prerogative of Sovereign Power. ^{17.}

V. But to come more close to the Question, whether Contribution may lawfully be paid: First, we are to make a Difference betwixt *perferre* & *inferre bellum*; the one is active, and properly at the beginning of a War, and in a place where yet no War is, and where its Cause only, and not its Effects, can be considered; in this case every thing ought to be very clear for Warrant of a Man's Conscience, because of the Calamities which he helps to introduce, and is in some manner the Author of; the other is passive, and there where War, or the Power of War is actually formed, which is the Case of this Discourse.

VI. Secondly, we are to distinguish betwixt that which cannot be had, nor the Value of it, unless we actually give it, and

that which may be taken by the Law of War whether we contribute or no.

VII. Most certain it is, though a War be not yet actually formed in a place, yet a scrupling Conscience, which likes not the Cause, may be excused in contributing to it in this one Case, viz. If some number of Men, able to take what they ask, demand (with an armed power) the payment of a certain sum to be employed in War, then in such a case, the Man, whom we suppose, may pay it as a Ransom for his Life, or give it as a Man doth his Purse, when he is surpris'd in the Highway, because to this Man it is as much as if the whole Country were possessed with an armed Power. So several *Dutchies* and *Seigniories* dependent on the *Empire*, did in the War between them and the Crown of *France*, pay Contribution.

4 H. 4. 2,

Procopius in the third of *Goth. of Totila* when he besieged *Rome*

saith, *Agricolis interim per omnem Italiam nihil mali intulit; sed iussit eos ita, ut soliti erant, terram perpetuo securos colere, modo ut ipsi Tributa perferrent*: This, saith *Cassiodore*, is the greatest Praise, 12, 15.

But if the Person or Country be not for the time in full Possession of him whose Cause he scruples at, and that he or they have not a probable fear of extreme danger, nor as probable assurance, that without his help the thing demanded nor its value can be taken from him or them, then there is little Excuse remains for the Act, because the very Act (which his Conscience dislikes) participates more of Action than of Passion.

VIII. But where a Man or City is fully possessed by an invading Power (be the same just or unjust) from whom he or they cannot fly, nor remove their Substance, most certain the payment of Contribution is no gift, any more

more than he (as above) who with his own Hands being set upon by Pirates or Robbers, puts his Purse into their Hands; for the Laws calls not that a *Gift*, nor excuses the Party from taking it. And altho' the Parties may employ the same to the Destruction perhaps of Innocents, and the like; yet that is an Action out of their Power that give, as far as Winds and Tempests are, to which two as we contribute nothing, so we cannot be scrupulous in our Consciences concerning their bad Effects; nor is the same repugnant to the *Canon Law*, (which teaches us humanity, and the imitation of all their Virtues) and therefore Persons, whose Lives are innocent and harmless, ought not to be subjected to Danger or Plunder, which hardly can be avoided without Contribution or Tribute.

IX. Again, those that live on Frontiers, whose condition is more ticklish and deplorable, because they are not fully possess'd, nor taken into the Line of either Party, these live as it were in the Suburbs of a Kingdom, and enjoy not the Security or Privileges of others, yet such Persons may lawfully contribute to both; for though they be but partly possess'd by one, and partly by the other, in respect of their sudden abandoning them, yet both Parties have the Power of destroying them wholly; wherefore those former Reasons which justify those fully possess'd, do also acquit the Payments of these; for their condition here is more calamitous, seeing they are really but Tenants at Will, expos'd to a perpetual Alarm, and that both Parties wound one the other only through their sides, as those this day that are situate between *France* and *Germany*; for being perhaps Neuters in the War, they

44 E. 3. 14.
4 H. 5. 3.
Coke 3. Inst.
fol. 68.

C. 2. de Treug.
& Pace. Nic.
Damasc.

Tacit. Hist. 4.

*Exemplum no-
bile vide apud
Parutam. lib.
3. Grot. l. 3.
c. 17.*

they are in that case by the Law of Arms to shew themselves equal to both, in permitting of Passage, in affording Provisions for the Armies, and in not relieving the Besieged.

*Geat. de Jure
Bellac. Paris.
l. 3. c. 8. §. 11.
c. 12. §. 4.*

X. Nor can the Interdiction of him to whom such owe Faith and Obedience, any ways create the same an Offence, since the declared Wills of our Governors cannot make all those of our Acts Sins, when we obey or submit to that Power, which against our Wills (as much as against theirs, and it may be with more of our Misery) hath divested them of the Power of their Rights, and deprived us of the Power of their Government; and by the Laws of War, they who have overcome, should govern those whom they have overcome; and therefore whatsoever is exacted by the Conquerors, may justly be paid by the Conquered.

*Jure hoc ve-
minat quod
quisque ob ru-
telam corporis
sui, jure fecisse
existimetur.
* Leg. ut vim.
D. de just. &
jur.*

And since Princes by their Commands cannot change the nature of human Condition, which is subject naturally to those fore-mentioned Changes, it would seem exceeding hard to oblige us to almost moral Impossibilities; and though those Political Commands were as Laws, yet doubtless they ought not to be obliging, but according to the Legislative Rule, which is, *cum sensu humane imbecillitatis*, this is that which is called the presumed Will* of a Governor, or the Mind of a Law; for in extreme Necessity it is to be presumed, that both their Wills proceeding from the Rigour of what they have declared, rather than by holding to that which is their supposed Right, introduce certain Miseries and Confusion, without receiving any Benefit thereby to themselves. Nor could they of *Utrecht*, and others of the conquered Cities in *Holland*, abandoned

abandoned afterwards by the *French*, and entirely preserved from Destruction, be condemned by their *Confederates*, for the Sums by them promised to the Enemy for the Preservation of the same.

Neither are such Commands or Interdictions without their sense and profit, though they be not positively obeyed; for thereby Governors shew to all the World, that they renounce no part of their Right, no, though it be there where they cannot exercise any part of their just Power.

And that is apparently evinced by the Laws of Leagues; for such being made, the same remains, altho' the same King or his Successor be driven out of his Kingdom, for the Right of the Kingdom remains, although he hath lost the Possession. *Grotius, lib. 2. cap. 17. §. 19.*

XI. Now the true Intention of such Commands or Interdictions is, that the Enemy should not by any means be assisted or strengthened; but if such Prohibitions should be obeyed, nay, at such a time, when they and all their substance are absolutely possess'd by the Enemy, most certain such Commands dash against themselves, and the one countermands the other; for if they refuse to submit in such a Case, then they do that which advantages their Enemies, because at that time they will take all, whereas in Case of Submission they ask but a part.

XII. In all Wars there are always some, by whose Disaffections Enemies gain more than by their Compliance, just as Physicians do by Distempers.

And although by variety of Successes, the just Governor should after recover that Place, which so submitted to the Power of their Enemies, and for that reason should punish those that were pliable to extreme Necessity; yet it follows

*In Republica
idem est nemi-
um, & nihil
mereri.*

follows not upon that, that they who so con-
formed, sinned, or did that which was abso-
lutely unlawful; for we well know, that rea-
son of State often calls for Sacrifices where
there is no fault to expiate: *Ostracism* and
Jealousy may make away those who are known
to deserve most; but in strict Right (which is
the Term of this Question) the just Gover-
nor ought to look upon them as more Unfor-
tunate than Faulty.

CHAP.

C H A P. XIII.

Of the Naval Military Part.

- I. *The Advantage that Princes have by a good Commander.*
- II. *The Love that naturally proceeds from the Mariners to those that are valiant and generous.*
- III. *Princes in Prudence ought not to listen too much to the Complaints against Commanders.*
- IV. *Of the Faults generally considered in Soldiers and Mariners.*
- V. *Of the Punishments that generally wait on such Offenders.*
- VI. *Of Drunkenness, Swearing, and other such sort of Impieties, not to be suffered in Fleets.*
- VII. *Spies, 'tis lawful to use them by the Laws of Nations, but being deprehended, are to suffer Death; and how they are to be dealt withal by the Laws of England.*
- VIII. *It is not lawful for a Friend or Neuter to relieve an Enemy, and Persons so offending, how punished.*
- IX. *Ships taken as Prize, the Ship, Papers, and other matters concerning the same, are to be preserved.*
- X. *Of things taken and acquired in War; how the Right of them becomes vested in the Captors, and how that is to be understood by the Law of Arms.*
- XI. *To steal the Cables or other Furniture of the King's Ships, how punishable at this day.*
- XII. *Ships surrendered or voluntarily yielded, how to be dealt with, and to those that shall resist, if entered by force, whether quarter may be refused.*
- XIII. *Ships of War generally ought not to be yielded; but if entered or disabled, whether they may not accept of Quarter, standing with the Oath, called Sacramentum Militare.*
- XIV. *Of obeying Orders, the same ought punctually to be followed; and if broken, though the Act succeeds well, whether the same subjects not the Actor to Punishment.*
- XV. *Of the Obligation incumbent on Commanders and Soldiers, to behave themselves valiantly, and the right of slaying an Enemy, where lawful.*

XVI, Ships

XVI. *Ships how obliged by the Law of Arms to the Assistance of one another; and of the Duty of those that have Fleets under their Convoy.*

XVII. *An Enemy beaten ought to be pursued, and how far it is lawful to slay such flying with their lives in their hands, by the Law of Arms, and how the reckoning several ought to be governed.*

XVIII. *Persons exempted from the sword by the Laws of Nature, Nations, Civil and Canon, and by the Municipal Laws of some Countries.*

XIX. *Mutinying how esteemed, valued and punished at this Day by the Practice of Armies, and by the Laws of England.*

XX. *Whether it be lawful to decoy the Subjects, Soldiers, or Mariners of an Enemy to forsake his Prince or General, and to bring over his Men, Ships or Arms; and where by Law they may be received; and how such Defectors may be punished by the Laws of Nations and of England.*

XXI. *Of Seducers, Message-carriers and Decoyers of Soldiers, how to be handled by the Law of Arms.*

XXII. *Of those that shall disobey or strike their superior Officers, how punishable.*

XXIII. *Of mutinying, and those that shall act in the same, how punished, though they have a just Cause of Complaint.*

XXIV. *Of the Care incumbent on Commanders and Masters of the Great Ships, in reference to their Safety, and the punishment of wilful burning and destroying them.*

XXV. *Of the general Offences at Sea, how punished.*

XXVI. *Court Martials how erected, and what Operation their Judgments have, and upon whom.*

XXVII. *Judges and Advocates Power in reference to giving an Oath, and the Admiral's Power how limited in the punishing of Offences.*

XXVIII. *Of maimed Soldiers and Mariners, and the Provisions that the Laws make for them at this Day.*

XXIX. *Of Triumphs.*

I. **A**N excellent General is an Evidence of the Fortune of a Prince, and the Instrument

strument that occasions the Happiness of a Kingdom; and therefore when God makes choice of a Person to repair the Disorders of the World, or the Good of a particular State, then is his Care shewed in the furnishing him with necessary Principles to undertake great Matters; the Thoughts are put in his Soul by that eternal Commander to execute; he troubles and confounds his Enemies, and leads him as by the Hand to Victories and Triumphs: And one of the greatest Expedients whereof he serves himself for this Purpose, is to raise unto him excellent Men, both in Courage and Conduct, to whom he communicates his Care, and who help him to bear the Weight of Affairs. *Alexander* had never conquered *Asia*, or made the *Indies* to tremble, but for *Ephestion*, *Parmenio*, and *Clitus*; *Cæsar* gained many a Battle by his Lieutenants; and the fairest *Empire* of the World, which Ambition and the Evil of the Times had divided into three Parts, was reduced under the Dominion of *Augustus* by the Valour of *Agrippa*; *Justinian* triumphed over *Persia*, and destroyed the *Vandals* in *Africa*, and the *Goths* in *Italy*, by the Aid of *Belisarius* and *Narses*: And it is most certain, that Noble Commanders are the Glory of their Princes, and Happiness of the People; on the other hand, Base, Cowardly and Treacherous Generals are the Shame of the one, and the Despair of the other.

II. Hence it is, that Soldiers and Mariners draw their Lines of Love even to the Mouths of Cannons with a good General, but Mutiny and Hate to the main Yard end against one that is Bad; for to obey them who are not their Sovereigns when they do them, hurt,

hurt, when they insult and are cruel in cold Blood, and Base, Cowardly or Treacherous in Battle, is a sad Necessity for them, and a hard Essay of Patience; yet must they be obeyed, and the Soldiers and Mariners must not rebel or repine, but submit till their Sovereign redresses their Misfortunes.

III. Again, *Princes* ought not to listen too much to the mutinous Demands of the *Crew*, or any others, whose Ambition watches their Ruin, whereby to conceive Anger against their *Commanders*; for it is easier to purge out the Choler and Discontent that is got under the Hatches, than to provide *Commanders of Conduct*, Courage, and Faithfulness to govern their Expeditions. *Belisarius*, that most excellent Commander, who had no other Crime than his *Reputation*, and was not culpable, but that he was Powerful, having conquered *Per-*

Procopius Hist. fa. subdued *Africa*, humbled the *Goths* in *Vandal. in Vi-* *Italy*, led Kings in Triumph, and made appear to *Constantinople* somewhat of *Old Rome*; an *Idea* of the antient Splendor of that proud *Republick*; after all his eminent Services, this

Vide Sir Wal- great *Person* is abandoned to *Envy*: A Sus-
ter Raleigh's picion, ill-grounded, destroys the Value of
Hist. Vol. II. so many Services; and a simple *Jealousy of*
p. 782. *State* wipes them out of the Memory of his
Edit. 1736. Prince; but he rests not there, for the De-
 meanour had been too gentle, if Cruelty had
 not been added to Ingratitude; they deprive

The Ingrati- him of all his Honours; they rob him of all
 tudethath his Fortune; they take from him the Use of
 been shewn the Day and Light, *they put out his Eyes*,
 by Princes to and reduce him to the Company of Rogues,
 many Brave and the miserable *Belisarius* demands a Charity,
 and Noble even that *Belisarius*, the chiefest General of his
 Generals and Age,

Age, and the greatest Ornament of the Empire, who after so many Victories and Conquests, accompanied with so high and clear a Virtue, and in the midst of *Christianity*, was reduced to so abject and low a Misery.

Nor was this cruel and hasty reckoning of *Justinian* let slip without a cruel Payment; for *Narses*, who was as well a Successor in Merit as in Authority to *Belisarius*, having notice of a Disdain, conceived likewise against him upon a single Complaint, resolved not to expose himself as a Sacrifice to their Malice; and therefore thinking it better to shake off the Yoke, than stay to be oppressed, soon spoiled the Affairs of *Justinian*, for the *Goths* revolted, and Fortune would not forbear to be of the Party which *Narses* followed, nor to find the *Barbarian* where so brave a Captain was engaged. Therefore not one or many Faults are to be listened to against Commanders, but patiently heard and redressed, not to disgrace or lose them; for such having committed a Fault, yet being admonished by love, may endeavour by future Services to make recompence by some noble Exploit; but disgraced, become Instruments often of Danger and Ruin to their Superiors.

IV. Soldiers and Mariners Faults are either proper to themselves, or common with others.

Those are common with others which other Men fall into, and are corrected with like ordinary Proceedings as other Crimes of like Nature, as Manlaughter, Theft, Adultery, and such like.

Those are proper which do purely appertain to the *Naval Military* part, and are punished by some unusual or extraordinary Punishment:

§. *Dere milit.*
De castrens
peculio, & C.
eadem tit. l. 12.
C. de erogatio-
ne militaris
annonæ & C.
de vest Mili-
tari.

nishment: As are these; Not to appear at the over-musters or calling over the Ship; to serve under him he ought not to serve; to vage or wander long from on Ship-board, although he returned of his own accord; to forsake his Fleet, Squadron, Ship, Captain, Commander, or Officer; to leave his standing to fly over to the Enemy; to betray the Fleet, Squadron, or Ship; to be disobedient to his superior Officers; to lose or sell his Arms, or to steal another Man's; to be negligent in his Officer's Command, or in his Watch; to make a Mutiny; to fly first out of the Battle, and the like, which are very frequently set forth in the Titles of the *Digest* and *Code* of Military Affairs, and other like Titles which accompany them.

Arrian, who wrote the Life of *Alexander the Great*, observes, *Every thing is counted an Offence in a Soldier, which is done contrary to the common Discipline*, as to be neglectful, stubborn, and slothful.

V. The Punishment wherewith Soldiers and Mariners are corrected, are those corporal Punishments, or a pecuniary Mulk or Injunction of some Service to be done, or a Motion and removing out of their Places, and sending them away with Shame.

By capital Punishment is understood for the most part Death, or at least beating with *Cat with Nine Tails*, as they commonly term it, *Ducking*, *Wooden-Horse*, *Gauntlet*, and such like, unless happily it be pardoned, either for the unskilfulness of the Mariner or Soldier, or the Mutiny of the Crew or Company, being thereto drawn by Wine, Wantonness, or for the Commiseration or Pity of the Wife and Children of the Party offending; all which

which is left to the Discretion of the *Lord Admiral*, and others the Supreme Commanders or Captains.

VI. It is necessary that in Armies and Fleets, all manner of Impiety should be prohibited, especially that of Swearing and Cursing; for such Sins are so foolish, that they unawares trip Men into Damnation, rendering Men worse than Beasts, by how much the more they court that Vanity of Sin, without any of the appendent Allurements, which other vitious Actions are accompanied with, the same in the end teaching Men to disavow GOD in their discourse and actions, by their intemperate and inconsiderate invoking him in their Oaths. *Against such, as also, against those that shall give themselves up to Cursing, Execrations, Drunkenness, Uncleaness, or other scandalous actions in Derogation of God's Honour, and corruption of Good Manners; Fines and Imprisonment, or such other Punishment may be inflicted on them by a Court Martial.*

VII. By the *Laws of Nations*, Spies may be sent to survey the Enemy's Force, Fleet, Station, or Squadron, and make discovery of whatsoever may give advantage to the Persons sending: So *Moses* and *Joshua* did into the *Holy Land*. On the other hand being apprehended, they are to be put to death, as *Appian* saith. But whether it be lawful to make Spies of the Subjects of that Prince with whom the War is begun, hath been some doubt: It is not lawful for a Subject to kill his King, nor to yield up his Ships of War without publick Council, nor to spoil his fellow Citizens, to these things it is not lawful to tempt a Subject that remains such; nor may any reply,

*Leg. transfug.
De de acq. re-
rum Dom.*

* As was in
the Peace
with Philip,
the Aetolians,
Antiochus, Po-
lyb. in excerpt.
legat. 11. 28.
38. Menand.
Protect. idem,
non decet.
Stat. 22. Geo.
2. cap. 33.
Artic. 3.

Artic. 4.

That to him who impelleth such a Man to a wicked Act, that Act, as namely the betraying of his Enemy, is lawful; no body doubts he may indeed do it, but not in that manner; but yet if a Subject will voluntarily desert his Prince and Country, *i. e.* so enter into a Correspondency with the Enemy of it, without any impulse but his own covetous or revengeful Mind, surely it cannot be unlawful for the other to receive him. *We receive a Fugitive by the Law of War*, saith Celsus, that is, it is not against the Law of War to admit such, even a Traitor, *who having deserted the Enemy's part, electeth ours*; however, such Persons ought not to be rendered, unless expressly stipulated *, but ought to be pardoned. *By the Laws of England, if any Officer, Mariner, Soldier, or other Person of the Fleet, shall give, hold, or entertain Intelligence to or with any Enemy or Rebel, without Leave from the King's Majesty, or the Lord High-Admiral, or Commissioners of the Admiralty, Commander in Chief, or his commanding Officer, such Person shall be punished with Death.* Now the bare receipt of a Letter or Message from an Enemy, will not make a Man subject to the Penalty of this Article, and therefore the subsequent Article explains the precedent, in which it is provided, that *If any Letter or Message from any Enemy or Rebel, be conveyed to any Officer, Mariner, Soldier, or others in the Fleet, and he shall not within Twelve Hours, having Opportunity so to do, acquaint his Superior Officer or the Officer commanding in Chief with it, he shall be punished with Death*; so likewise shall any superior Officer, being acquainted therewith, shall not in convenient Time reveal the same to the Commander in Chief of the Squadron.

All Spies, and all Persons in Nature of Spies, Artic. 5. bringing or delivering any seducing Letters or Messages from any Enemy or Rebel, or endeavouring to corrupt any Captain, Officer, Mariner, or other in the Fleet, to betray his Trust, shall be punished with Death, or such other Punishment as the Nature and Degree of the Offence shall deserve, and the Court Martial shall impose. Now Spies are put to Death sometimes justly by those that manifestly have a just cause of Warring by others, by that licence which the Law of War granteth; nor ought any Person to be moved with this, that such being taken, are punished with Death; for that proceeds not from their having offended against the Law of Nations, but from this, that by the same Law every thing is lawful against an Enemy; and every one, *Ad Leg. Corn. de Sicariis pun. Tacit. Hist. 5.* as it is for his own Profit, determineth either more rigorously or gently: But that Spies are both lawful and practicable, there is no Question; for at this day, by the general Instructions of Fleets, there are always out of each Squadron some Frigates or Ships appointed to make discovery of the Enemy, and upon sight to make Sail, and to stand with them, in order to take cognizance of their Force, as well Ships of War as Fire-Ships, and in what Posture they lay; which being done, *those detecting Frigates are to speak together, and to conclude on the Report they are to give, which done, they return to their respective Squadrons;* such Ships in such Service are not obliged to fight, especially if the Enemies Force exceed them in number, or unless they shall have an apparent Advantage.

VIII. Again, it is not lawful for any, be *Bartol. Leg. nullus Leg. 2. de Judæis Ca-* he Friend or Neuter, to relieve an Enemy, *much licolis.*

Procopius
Goth. 1.

Artic. 6.

Artic. 7.

much less for a Soldier or Mariner in pay, to supply him that conspires the destruction of my Country, is a liberality not to be allowed of: He is to be accounted an Enemy that supplies the Enemy with Necessaries for the War; and therefore by the Laws of War is so to be esteemed; and by the Laws of England, No Person in the Fleet shall relieve an Enemy or Rebel with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other Supplies whatsoever, directly or indirectly, upon Pain of Death.

IX. All the Papers, Charter-Parties, Bills of Lading, Pass-ports, and other Writings whatsoever, that shall be taken, seized, or found aboard, are to be duly preserved, and the very Originals are to be sent entirely, and without Fraud, to the Court of Admiralty, or such other Court of Commissioners, as shall be authorized to determine whether such Prize be lawful Capture, there to be viewed, made use of, and proceeded upon, according to Law, upon Pain that every Person so offending herein, shall lose his Share of the Capture, and shall suffer such further Punishment, as the Nature and Degree of his Offence shall be found to deserve, and the Court Martial shall impose.

X. The Right of taking of Spoil was approved of God, within those natural Bounds which have been already mentioned, as is further evinced by the Appointment of God in his Law, concerning the Acquisition of Empire over the conquered, after refusal of Peace,
Deut. xx. 14. *All the spoil thereof shalt thou take unto thyself, and thou shalt eat the spoil of thine Enemies, which the LORD thy GOD hath given thee.* Hence it is, that things taken from the Enemy, presently become theirs that take them,
by

by the Law of Nations, and such Acquisition is called *Natural*, for not any cause, but the naked fact is considered: And thence a Right ariseth; for as the Dominion of things began from Natural Possession, and some print of the same remains in the things taken in the Land, the Sea, and the Air, so likewise of things taken in War; all which instantly become theirs that first become Captors; and from the Enemy are judged to be taken away those things also which are taken away from the Subjects of the Enemy. But though this gives a Right to the Captors, yet that must be understood to the Sovereign, or to the State that imployed them, and not to themselves; but if they have any share of the Prize, the same proceeds by the condescension or grant of the Sovereign, which may be enlarged or abridged as occasion serves; and therefore by the Laws of *England, the full and entire Account of the whole Prize, without Embezzlement, shall be brought in, and Judgment past without Fraud*; but that is to be understood; where the Ship voluntarily yields: But Ships whom they shall assault, and take in fight as Prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures or Stores of such Ships) as shall be found by the Captors, *upon or above the Gun-Deck of the Ship, become theirs*; but this is to be understood where such Prize may lawfully be possesst; for there are times when such are not to be meddled with; and therefore it is against the Rules of War in Fight, if some of the Enemies Ships are there disabled; yet those Ships that did so disable them, if they are in a condition to pursue the Enemy, cannot during the Fight take, possess,

*Leg. Nat. § ult.
de D. acq. rer.
Dom. tit. de
rerum Deo.*

*Quæ armis
quæstæ essent
& parta belli
jure non dimittenda.*

Artic. 8.

By the donation of his Majesty.

sefs, or burn fuch disabled Ships; and the reason is, *left by fo doing some more important service be lost*, but they are to wait for fuch Booty, till the *Flag-Officers* fhall give command for the fame.

*Hift. Reipubl.
Venet. fol.
127, 128.*

Vluzzali, King of *Algier*, in the famous Battle of *Lepanto*, having behaved himfelf very valiantly there againft the *Chriftians*, fo that he destroyed feveral of their Gallies, and others, he took amongst the reft of the Gallies of *Pietro Bua* of *Corfa*, of the *Prior of Messina*, and *Ludovico Tipico* of *Trabu*, and *Benedeto Soranzo*, the which he towed after him before the Battle was compleated; but that getting proved the lofs both of the one and of the other; for the *Turks*, out of Covetoufnefs of the Plunder, or otherwife thronging into them, occafioned their taking fire, in which the *Victors*, in thofe Flames became *Victims*, and after followed the total Rout of the *Ottoman Power*.

XI It is almoft impoffible, but that in Ships of War, which in thefe days carry fo confiderable a force of men, there will be fome amongst them that have Heads of knavery, and Fingers of Lime-Twigs, not fearing to ftel that from their Prince, which is applicable only for the Good of their Country; fuch fort of *Night-wolves* when caught, are to be feverely punifhed.

Artic. 9.

Craſus perſuading *Cyrus* not to give up *Lydia* to be pillaged by his men, tells him, *Non meam, inquit, non res meas diri-*

XII. By the Ninth Article, *If any Ship or Veffel ſhall be taken as Prize, none of the Officers, Mariners, or other Perſons on board her, ſhall be ſtripped of their Cloaths, or in any ſort pillaged, beaten or evil intreated; upon Pain that the Perſon or Perſons ſo offending, ſhall be liable to ſuch Punifhment as a Court Martial ſhall think fit to inflict.* This Law moſt expreſſly doth

doth not extend to those that obstinately *piet, nihil enim*
shall maintain a Fight ; for most certain, by *ad me jam*
the Law of Arms, if the Ship be boarded *ista pertinent :*
and taken, there remains no restriction but *tua sunt, tua*
that of Charity ; and if a Ship shall persist *illi perdent.*
in the Engagement, even till the last, and *Herod. lib. 1.*
then yield to Mercy, there hath been some **Victor de Ju-*
doubt, * whether Quarter ought to be given *re Belli, n. 49.*
to such (for they may ignorantly maintain *§ 60.*
with Courage a bad Cause) but in Captives, *D. & C. de Ju-*
and those that yield or desire to yield, there *ris & facti ig-*
is no danger. Now that such may be justly *norantia.*
killed, there must be some antecedent Crime, *Princes in-*
and that such a one as an equal Judge would *deed are Gods,*
think worthy of Death ; and so we see great *but neither*
severity shewed to the Captives and those *do the Gods*
that have yielded, or their yielding on con- *hear the pray-*
dition of Life not accepted, if after they *ers of suppli-*
were convinced of the Injustice of the War, *cants, except*
they had nevertheless persisted with Hatred *they be just.*
or Cruelty ; if they had blotted their Ene-
mies Name with unsufferable disgraces ; if
they had violated their Faith or any Right
of Nations, as of Ambassadors ; if they
were Fugitives : But the Law of Nature
admits not Taliation, except against the
very individual Person that hath offended ;
nor doth it suffice, that the Enemies are by
a fiction conceived to be as it were one
Body ; tho' otherwise by the Laws of Na-
tions, and by the Laws of Arms, and at this
day practised, in all Fights, the small Frigates,
Ketches, and Smacks are to observe and
take notice of the Enemies Fire-ships, and
to watch their Motion, and to do their best
to cut off their Boats, and generally *The Syracu-*
ans were ac-
cused for that
they slew the
Wives and
Children of
Hycetas, be-
cause Hycetas
had slain the
Sister and Son
of Dion: Plu-
tarch. Timon:
& Dion.
the per-
sons found in them are to be put to death, if
taken,

taken, and the Vessel, if not taken, destroyed; and the reason why the extremity of War is used to such, is that by how much the Mischief is the greater by the Act of such Men, if executed, by so much the Punishment is aggravated, if taken, and Quarter denied them by the Law of War!

Artic. 10.

XIII. Every Flag Officer, Captain and Commander, who upon signal or order of Fight, or sight of any Ship which it may be his Duty to engage, or who upon likelihood of engagement, shall not make the necessary preparations for Fight, and shall not in his own Person, and according to his Place, encourage the Inferior Officers, and Men, to fight courageously, shall suffer Death, or such other Punishment as from the Nature and Degree of the Offence, a Court Martial shall deem him to deserve; and if any Person in the Fleet shall treacherously or cowardly yield, or cry for quarter, shall suffer Death. Now, though Soldiers, or Mariners, have obliged themselves faithfully to serve in the Expedition or Navy; yet that is to be understood no further than his or their power to do their utmost in his or their Quality; for though the Obligation for the Service be taken in the strictest Terms of undergoing death and danger; yet it is to be understood always conditionally as most Promises are, viz. if the action or passion may be for that Fleet or Prince's Advantage; and therefore if the Fleet or Squadron is beaten and the Ships are disabled, and left scarce without any to defend them, now the Soldiers or *
 * Lipfius de Mil. Rem. l. 2. dial. 6. & 4. And Polybius expresseth the
 Mariners remaining can do no more for their Prince than die, which indeed is to do nothing at all, but to cease for ever from doing

doing any thing either for him or themselves ; in those straits therefore it is not repugnant to their Oath, called *Sacramentum Militare*, to ask quarter or to strike, and having begged a new Life and taken it, they are bound in a new and just Obligation of Fidelity to those whom they were bound to kill few hours before ; neither can the Prince or General expect by virtue of their former Obligation to him, they should kill any in the place where the Quarter was given : However, this Fidelity hath not its inception from the time of taking quarter ; but when the Battle is over, and that time which is termed cold blood ; for without all controversy, if a Ship be boarded, and Quarter is given, yet if while the Fight lasts, the Persons Captives can by any possibility recover their Liberty and Ship, they may, by the *Law of Arms*, justly acquire the same *.

Oath thus, *Obtemperaturus sum, & facturum quicquid mandabitur ab Imperatoribus, juxta vires* : and such, says he, were termed *Militis per Sacramentum*.

* Sir Thomas Chicheley did

so aboard the *Katharine* in the War with Holland.

And since Impunity is granted to such unfortunate Deserters, yet it must be apparently evident and fully proved, that they were reduced into a Condition beyond all hope in the Battle ; and therefore the Foot that forsook the *Unfortunate Pompey* before the Field was lost, were justly condemned for the breach of the *Roman* Discipline and Law of Arms : And therefore the Article hath not positively declared Death only, but added, *or such other Punishment as the Offence shall deserve*, which Provision leaves the Action to be judged and punished by a *Council of War*, who know best what's to be done in Cases of that nature ; however, a base or cowardly

cowardly yielding, or crying quarter, is to be punished with Death, and that without Mercy.

Zenoph. Cyr.

Plutarch.

Quæst. Rom.

39. & Marcello.

Vide in Tit.

Ships of War.

XIV. The obeying of Orders hath in all Ages been in mighty esteem; *Cbrysantus*, one of *Cyrus's* Soldiers, being upon his Enemy, withdrew his Sword, hearing a Retreat sounded; but this comes not from the external *Laws of Nations*; for as it is lawful to seize on the Enemy's Goods, so likewise to kill the Enemy, for by that Law the Enemies are of no account; but such Obedience proceeds from the *Military Discipline* of several Nations. By the *Romans* it was a Law

Leg. desert. D.

de re Milit.

noted by *Modestinus*, That whosoever obeyed not his Orders, should be punished with Death, though the matter succeeded well: Now he also was supposed not to have obeyed, who out of Order, without the Command of the *General*, entered into any Fight. For if such liberty were lawful, either Stations would be deserted, or (licence proceeding) the Army, Fleet, or Squadron would be engaged in unadvised Battles, which by

Liv. lib. 7.

Manliani Imperia.

The Order of all means is to be avoided. *M. Capello*, a *Venetian* Gentleman of an antient Extraction, having the Charge of the guarding the *Venetian Gulph* *, met with the *Barbary Fleet*, to whom he so assaulted, that he burnt and took divers of them; amongst the rest the *Admiral Galley of Algier*, (a Vessel of vast bigness) which he brought with him away, and she remains at this day a *Trophy* in the *Arsenal of Venice*; the Service, although Noble and Honorable, and such as brought renown to the Republick, yet in regard it was an Action exceeding his Commission, he was adjudged to punishment (but his great Merit

The Order of Battle is to be preserved, and in all cases they are to endeavour to keep in one line as much as may be; and though they have beaten some of the Enemy, yet must they not pursue a small number, before the main

Merit and Alliance preserved his Life : (such of the Enemy be beaten an exact Obedience that Signory expects to my be beaten or run. Nor be paid to her Orders, be the Success never ought they in so glorious. And by the Eleventh Article, chasing, chase Every Person who shall not duly observe the beyond fight Orders of the Admiral, Flag Officer, Commander of the Flag, of any Squadron or Division, or other his Superior Officer, for assailing, joining Battle, or making Defence against any Fleet, Squadron or Ship, and at night all chasing Ships are to or shall not obey the Orders of his Superior Officer, Flag. Instr. as aforesaid, in time of Action, to the best of 22, 23. in his Power, or shall not use all possible Endeavours * History of to put the same effectually in Execution, he shall the Republic suffer Death, or such other Punishment, as from lick of Venice, the Nature and Degree of the Offence a Court fol. 170, 171. Martial shall deem him to deserve.

XV. Again, Every person in the Fleet, who Artic. 12. thro' Cowardice, Negligence, or Disaffection, shall It was on this in time of Action withdraw or keep back, or not Article that come into the Fight or Engagement, or not do his Admiral Byng suffered utmost to take or destroy every Ship which it is his the 14th of Duty to engage, and to assist all his Majesty's Ships, March 1757. or those of his Allies, which it is his duty to assist, See his Trial. shall suffer Death. By the word Captain the General In milite unius neral or Admiral is not included, but all Flag- sors est, in Imperators universorum periculum : unus homopluris sumit quam universa civitas. Clearchus Cyro dedit consilium, ne ipse se in periculum offerret sed inspectorem se pugnae gereret; pugnantes enim corpore their nil magni effici-

corret, si verò
quid damni ac-
ceperit, omnes
se perditurum
quos secum ha-
beret. Polyb.
Stra. lib. 2.
† Guicciard l.
3. Aphor. 28.

their Person to apparent Peril, but in case of a general Overthrow and manifest Defeat. *Peter Capponi*, the Famous General for the *Florentines* besieging *Soigna*, and encamping on the River *Casina* †; being in a Place of danger, extremely industrious about planting his Battery, was shot with a Harquebuss, immediately upon which the Siege was raised; yet, on the other hand; let it be examined where any famous battle hath been obtained, and the same was not got, not only by the Conduct, but likewise by the single and personal Courage of the General.

Cicero Offic. 1.
§ 2.

Grotius de
Jure Belli ac
Pacis, l. 1. c.
2. §. 1.

Misericordia
infortuniis de-
betur: at qui
deliberatū

There are some Offices to be done, even to them from whom you have received an Injury; for Revenge and Punishment must have a measure; and therefore the Issues of the *Roman Wars* were either mild or necessary: Now, when killing is just in a just War, according to internal Justice, may be known by examining the Causes or End of the War, which may be for the Conservation of Life and Members, and the keeping and acquiring of things useful unto Life; now in the assaulting of Ships, it happens that one is slain on purpose or without purpose; on purpose can no man be slain justly, unless either for just punishment, as if without it we cannot protect and defend our Life, Goods, and Country, &c. That such Punishment may be just, it is necessary that he who is slain have offended, and that so much as may be avenged with the punishment of Death in the Sentence of an equal Judge. Now we must note, between full Injury and mere Misfortune often intercedes some mean, which is as it were composed of both,

both, so that it can neither be called the Act of one knowing and willing, nor merely the act of one ignorant or unwilling.

This distinction by *Themistius* is fully illustrated: You have made a difference betwixt an Injury, a Fault, and a Misfortune; although you neither study Plato, nor read Aristotle, yet you put their Doctrine in practice; for you have not thought them worthy of equal punishment, who from the beginning persuaded the War, and who afterward were carried with the stream, and who at last submitted to him, that now seemed to have the biggest Power; the first you condemned, the next you chastised, the last you pitied.

Most certain, to spare Captives or Prisoners of War, is a command of Goodness and Equity; and in Histories they are often commended, who when too great a number prove burthensome or dangerous, chose rather to let them all go than to stay them, or detain them, though for Ransoms; as in the last *Flemish Wars* with *England*. So for the same causes, they that strike or yield up themselves are not to be slain (though there is no Provision made by Covenant.) In Towns besieged it was observed by the *Romans*, before the *Ram* had smitten the Wall; *Cæsar** denounceth to the *Aduatici*, he would save their City, if before the *Ram* had touched the Wall, they yielded; which is still in use in weak Places, before the great Guns are fired; in strong places, before an Assault is made upon the Walls†; and at Sea, by firing one or two Guns, or hanging out the Bloody Flag, according as the Instructions are; however, till there be an absolute yielding or quarter cried, by the *Law of Arms*, as well as the abovementioned Article, every Commander and Soldier is to do

scientia male agit, non infelix, sed iniustus: And

Cicero hath a Saying out of *Demosthenes*; We must shew compassion to those whom Fortune, not their own Deeds, have made miserable.

Scipio Emilianus at the Overthrow of *Carthage*, proclaim'd that they should fly that would.

Polybius, vide *Tacitus Annal.* 12.

Vide *Serran. in reb. Franc.* 1. & *Hen.* 23. *Thucyd. lib.*

* *Cæsar lib. 2. de bello Gallico.*

† *Dinant* in *Germany* being taken by Assault, the Town was razed and burnt; and the Prisoners all

put to Death. do his utmost to take, fire, kill, and en-
Phil. Comin. damage the Enemy, or whatsoever may tend
lib. 2. cap. 1. thereunto.

XVI. By the *Law of Arms*, he deserves punishment who doth not keep off force that is offered to his Fellow Soldier; and though it hath been conceived, if there be manifest danger, that he is not bound to come into his Relief; for such Commander may prefer the lives in his own Ship before those in another, yet that suffices not; for every Soldier by the Law of Arms is not only bound to defend, but also to assist and relieve his Companion: Now Companions are in two respects, either those that are in actual service with such Soldiers, or those that are not, but only committed to their Protection or Convoy, which are to be defended and guarded at the same peril and charge that a fellow Soldier is; and therefore all Ships that are committed to Convoy and Guard,

Artic. 13.

Every Person in the Fleet, who through Cowardice, Negligence, or Disaffection, shall forbear to pursue the Chace of an Enemy, Pirate, or Rebel, beaten or flying, or shall not relieve or assist a known Friend in view to the utmost of his Power, shall suffer Death.

Etiam hujus rei in feris imago quædam. Leo in Adulteræ pœnam confurgit. Plin. Hist. Nat. 8. 16.

Protection of Convoys by the *Laws of Nations*, is of a great Utility to a Kingdom or State; therefore when Violence is offered to those Ships under Convoy, they are not said to be done to them, but to those Ships of War under whose Guard they pass; and therefore when Violence is offered to such, publick Revenge is let in, according to that of *Tacitus*, *He should provide for their Security by a just Revenge.* Now that such Ships may not

not suffer Wrong from their Invaders, two ways may be taken by their Convoys: First, by destroying him or them that shall have attempted and committed any hostile Act against any thing under their Protection; secondly, by all ways imaginable endeavour the weakening his or their Force, that he or they may not be able to do any other or further Hurt; therefore there is no doubt but Vindication to these Ends is within the Bounds of Equity, though this is no more than private; yet if he respect the bare Law of Nature, abstract from Laws Divine and Human, and from all not necessary Accidents to things, it is not unlawful, whether the Satisfaction or Revenge is taken by Convoy Ships themselves, or the wronged ones under his or their Guard or Protection, seeing it is consensaneous to Nature, that Man should receive Aid from Man; and in this Sense may be admitted that saying of Cicero, *The Law of Nature is that which comes not from Opinion, but innate Virtue*: Among the Examples of it is placed *Vindication*, which he opposes to *Favour*; and that none might doubt how much he would have understood by that name, he defines *Vindication*, *whereby, by defending or revenging, we keep off Force and Contumely from us and ours, who ought to be dear unto us, and whereby we punish Offences*.

Now those Ships that are not under Convoy, but engaged in Fight, are faithfully to be relieved; and therefore if a Squadron shall happen to be over-charged and distressed, the next Squadron or Ships are to make towards their Relief and assistance upon a Signal given them. Again, Ships that are disabled by loss

of Masts, shot under Water, or the like, so as they be in danger of sinking or taking, the distressed Ships generally make a Sign by Wast of their *Jack* and *Ensigns*, and those next to them are bound to their Relief: But yet this does not always hold place; for if the distressed Ship is not in probability of sinking, or otherwise encompassed with the Enemy, the Reliever is not to stay under pretence of securing them, but ought to follow his Leader and the Battle, leaving such lame Ships to the Sternmost of the Fleet, it being an undoubted Maxim, *That nothing but beating the Body of the Enemy can effectually secure such disabled Ships.*

XVII. It is not enough that Men behave themselves valiantly in the beating of an Enemy, for that is not all, but the reducing of them into a condition to render right either for Damage done, or to render that which is right; which can't well be done without bringing him to Exigences and Straits; and therefore if the Enemy, Pirate, or Rebel be beaten, *None, through Cowardice, Negligence, or Disaffection, ought to forbear the Pursuit, and those of them flying; nor ought such, either through Cowardice, Negligence or Disaffection, forbear the Assistance of a known Friend in view, to their utmost Power, the Breach of which subjects the Offenders to the Pains of Death, or at least such Punishment as a Court Martial shall think fit.*

Artic 14.

But that is to be understood as in the 12th §. of this Chapter.

Empires are got by Arms, and propagated by Victory; and by the *Laws of War*, they that have overcome, should govern those they have subdued. Hence it is, that Generals having compleated a Conquest in a just War, and

and in chase or otherwise have taken the Ships or Goods of the Enemy, have absolute Power over the Lives, Estates, Ships and things that they by Force of Arms have acquired by the *Laws of Nations*.

But yet in such Conquests where the reeking Sword knows no Law, that is, they are done *impune*, without Punishment, (because co-active Judges do grant them their Authority) yet such Power may be exorbitant from that Rule of Right called *Virtue*; and though by the *Law of War* Captives may be slain, yet what Law forbids not, Modesty prohibits to be done. Hence it is, that *Generals* do often restrain that Power of killing; for though such Prisoners of War do fight for the Maintanance of an unjust Cause, and although the War is begun by a solemn Manner; yet all Acts that have their rise from thence, are unjust by internal Injustice, so that they who knowingly do persist in fighting, yet ought they not always to be slain, according to that of *Seneca*; *Cruel are they, says he, that have Cause of Punishment, but have no measure*. For he that in punishing goes further than is meet, is the second Author of Injury; and the principal Reason why Mercy is often shewed, is, for that Soldiers of Fortune offend not out of any Hatred or Cruelty but out of Duty.

XVIII. Again, *Generals* in the Measure of killing, look commonly no further than the Destruction of those who by Force of Arms oppose them; and though Ships or Cities are taken by Assault, the which by the Laws of War, subjects every individual to the Mercy of the Conqueror, yet Children, Women,

Tacit. 3. Annal. Pompeius gratior remittis quam delicta erant.

Grot. de Jure Belli ac Pacis, l. 3. c. 10. §. 2. de Clem. cap. 4.

In Vita Camilli. Liv. lib. 1, & 5.

old Men, Priests, Scholars, and Husbandmen are to be spared; the first by the Law of Nature, according to that of *Camillus*: *We have Arms*, says he, *not against that Age which even in taking Cities is spared, but against armed Man*: And this is the Law of Arms amongst good Men; by which we are to note, that by the Words *good Men*, as is observed, we mean the Law of Nature, for strictly by the Law of Arms, the Slayers of them are without Punishment.

Grotius, lib. 3. cap. 11. who observes, that many

Pretences may be found out against Men of mature Age, but against Infants, Calumny itself can find nothing to say, as being clearly Innocents.

Herod. in Vita Maximin. fol. 417.

Now that which hath always place in Children that have not attained the use of Reason, for the most part prevails with Women; that is, unless they have committed something peculiarly to be avenged, or do usurp manly Offices, as flinging of Stones from the Walls, pouring down burning Pitch, Brimstone, and the like bituminous Stuff, firing of Guns, and the like; for it is a Sex that hath nothing to do with the Sword, that are capable of that Clemency.

Papin: nullus violabilis armis Turba ferret. Viñ. D. loco.

1 Sam. x. 5. and 1 Sam. xix. 18.

The like for Old Men, who, *Papinius* observes, are not to be slain; so for Ministers of sacred things, even barbarous Nations have had them in Reverence and Preservation; as the *Philistines*, Enemies of the *Jews*, did to the *College of Prophets*, to whom they did no Harm: And with those Priests are justly equalled in this Respect, they that have chosen a like kind of Life, as *Monks* and *Penitents*, whom therefore as well as Priests, the *Canons* following in natural Equity will have spared:

spared: To these are deservedly added those ^{ad Instit. 58.} that give themselves to the study of good Learning and Sciences useful to Mankind, be it in *Universities*, or other publick *Schools* or *Colleges*. But yet if any of these be taken in actual Service, they then may receive the common Fate of others. So our King *Richard* the First, having taken the Martial Bishop of *Beauvais* Prisoner, received a Letter from the *Pope*, that he should no longer detain in Custody his dear Son; the King sent the *Pope* back the Armour wherein he was taken, with the Words of *Jacob's* Sons to their Father, *See whether or no this be the Coat of thy Son.*

To these are added Tradesmen, so likewise ^{Leg. execut. C.} Merchants, which is not only to be under- ^{quæ res pign.} stood of them that stay for a time in the Enemy's Quarters, but of perpetual Subjects; for their Life hath nothing to do with Arms, ^{Vide 2 Instit. 58. &} and under that Name are also contained other ^{Trin. 21 E. 1.} Workmen and Artificers, whose Gain loves ^{Rot. 127.} not War but Peace.

Again, Captives, and those that yield, are not to be slain, for to spare such is a *Command of Goodness and Equity*, says *Seneca*; however it may so come to pass, that though ^{De Benefic. 5.} the military Power may exempt a Prisoner of ^{cap. 18.} War from the Execution of the Sword, yet it may be out of their Power to exempt or discharge a Delinquent or Traitor from the Execution of the Magistrate, as if the Fleet were prepared, and the War principally begun for the Suppression of such; and the Reason of this is, if it should be in the Power of one Soldier, who takes a Traitor Prisoner upon such Terms, it would *pari ratione* be in the Power of all to pardon; not that the Ar-

*Libertinum in-
gratum in pri-
stinam redigit
servitutem.*
Fortescue,
cap. 46.

Liv. lib. 28.
The same
faith Julian
in Nicetas.

Grot. lib. 3.
cap. 11.

2 de Ira cap.
10. Quicquid
multis peccatur
inultum est.
Magis monen-
do quam mi-
nando, sic enim

ticle hath no effect, for the Traitor is by that freed from the immediate Execution of the Sword: Sure it is, that if the yielding be in *aperto praelio*, methinks absolute Pardon is implicitly in the Contract: However this is undeniable, that having yielded himself Prisoner of War, if he escape, he forever loses the Benefit of the Promise. Nor are Hostages to be destroyed, according to that of *Scipio*, who said: *He would not shew his Displeasure on harmless Hostages, but upon those that had revolted; and that he would not take Revenge of the unarmed, but of the armed Enemy.* 'Tis very true by the Law of Arms, if the Contract be broke for which they became Hostages, they may be slain, that is, the Slayer is without Punishment: But yet some conceive the Slayer is not without Sin, for that no such Contract can take away any Man's Life; that is, I suppose, an Innocent's Life; but without Controversy, if those that become Hostages be, or were before, in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great Matter, the Punishment of such may be free from Injury.

XIX. Where Offences are of that nature as they may seem worthy of Death, as Mutiny, and the like, &c. it will be a Point of Mercy, because of the multitude of them, to remit extreme Right, according to that of *Seneca*: *The Severity of a General shews itself against Particulars, but Pardon is necessary when the whole Army is revolting: What takes away Anger from a wise Man? the multitude of Transgressors.* Hence it was, that casting

of * Lots was introduced, that too many might not be subjected to punishment.

agendum est cum multitudine peccantium, severitas autem exercenda est in peccata paucorum. Vide Gaillium de Pace publ. lib. 11. cap. 9. 36.

* *Vide Grot. lib. 3. cap. 11. §. 17.*

However, all Nations have generally made it a standing Rule in the Punishment of Mutineers, as near as possible to hunt out the Authors, and make them Examples †.

† *Videtur de Jure Belli. n. 35. lib. 2.*

And therefore by the 14th Article. *If when Action, or any Service shall be commanded, any Person shall presume to delay or discourage the said Action or Service, upon pretence of Arrears of Wages, or upon any pretence whatsoever, he shall suffer Death, or such other Punishment, as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve; and indeed the same ought to be without Mercy, by how much the more they may raise a Mutiny at a time when there is nothing expected but an Action, and the shewing the most obsequious Duty that possibly may be; the Breach of which may occasion the Damage of the whole Fleet, and being of such dangerous Consequence, ought to be severely punished. Gustavus Adolphus, upon his first entrance into Germany, perceiving how that many Women followed his Soldiers, some being their Wives, and some wanting nothing to make them so but Marriage, yet most passing for their Landresses (though commonly defiling more than they wash) the King coming to a great River, after his Men and the Waggonns were passed over, caused the Bridge to be broken down, hoping so to be rid of these feminine Impediments; but they on a sudden lift up a panick Shriek which pierced the Skies, and*

the Soldiers Hearts on the other side of the River, who instantly fell into Mutiny, vowing not to stir a Foot further except with Baggage, and that the Women might be fetched over, which was done accordingly; for the King finding this ill Humour so generally dispersed in his Men, that it was dangerous to purge it all at once, smiled out his Anger for the present, and permitted what he could not amend. So likewise, *If any Person shall endeavour to make any mutinous Assembly upon any Pretence whatsoever, he shall suffer Death: And if any Person shall utter any Words of Sedition or Mutiny, he shall suffer Death, or such other Punishment as a Court Martial shall deem him to deserve: And if any Officer, Mariner, or Soldier, shall behave himself with Contempt to his superior Officer, such superior Officer, being in the Execution of his Office, he shall be punished according to the Nature of his Offence by the Judgment of a Court Martial.*

Artic. 19.

Artic. 20.

If any Person shall conceal any traiterous or mutinous Practice or Design, he shall suffer Death, or such other Punishment as a Court Martial shall think fit; and if any Person shall conceal any traiterous or mutinous Words spoken by any, to the Prejudice of his Majesty's Government, or any Words, Practice, or Design, tending to the Hindrance of the Service, and shall not forthwith reveal the same to the commanding Officer, or being present at any Mutiny or Sedition, shall not use his utmost Endeavours to suppress the same, he shall be punished as a Court Martial shall think he deserves. And whereas in any of the Offences committed against any of the Articles for the Government of any of His Majesty's Ships of War, within the narrow Seas,

Seas, wherein the Pains of Death are to be inflicted, Execution of such Sentence ought not to be made without leave of the *Lord Admiral*; *this of Mutiny is totally excepted*, for such may be executed immediately.

XX. It is not lawful for Princes or States to make of their Enemies Traitors, or cause *Grotius, l. 3.* them to desert the Service of their Prince, or *1. §.* to bring over their Ships, Ordinance, Provisions, or Arms; for as 'tis not lawful for any Subject to do the same, so neither to tempt him; for he that gives a Cause of sinning to another, sins also himself; but if a Man will voluntarily, without any other Impulse than his own, bring over the Ships or Armies, or desert the Service of his Prince to serve another, this, though a Fault in the Deserter, is not in the Receiver: *We receive a Fugitive by * Leg. Trans-*
*the Law of War, (saith * Celsus) that is, it is sug. de acqu.*
not against the Law of War to admit him, who rerum dom. Po-
having deserted his Prince's part, elected his lyb. in excerp.
Enemy's; nor are such to be rendered, except Legat. 9. 28.
it shall be agreed, as in the Peace of † Lewis 34. Menander
the Eleventh. However such sort of Game- Protector idem
sters, if caught, are to be severely punished; nos docet.
and therefore it is provided, That if any Sea- †Phil. Comin.
Captain, Officer, or Seaman, shall betray his lib. 4. cap. 12.
Trust, or turn to the Enemy, Pirate, or Rebel, Artic. 16.
or run away with their Ship or Ordinance, Am-
munition, or Provision, to the weakening of the
Service, or yield the same up to the Enemy, Pi-
rate or Rebel, they shall be punished with Death;
so likewise, If any desert the Service or the Em- Artic. 17.
ployment which they are in on Ship-board, or
shall run away, or entice any other so to do, they
are subject to the like pain of Death. And by
the Law of Nations, such Deserters that run
away

Tertul. Apol. away from their Colours or Fleet before
9. c. quando Peace proclaimed and concluded, all Persons
liceat, l. 2. in of that Prince from whom they fled, have a
reos majestatis Right indulged to them to execute publick
& publicos Revenge.
hostes omnis
homo miles.

Vide Grot. lib. 1. cap. 5. Henley. Rep. 235. 7 H. 7. cap. 1. 3 H. 8.
cap. 5. Hutt. 134.

Liv. l. 2. c. 3.
§. ult. ad Leg.
Corn. de Sicar.
pun.

Artic. 5.

XXI. By the Laws of Nations, Spies may be sent to view and survey the Enemy's Force, Fleet, Station, and make discovery of whatsoever may give Advantage to the Persons sending, as is mentioned above; but being apprehended they are put to Death; and therefore all Persons in the nature of Spies, bringing or delivering any seducing Letters or Messages from any Enemy or Rebel, or endeavouring to corrupt any Captain, Officer, Mariner, or other in the Fleet, to betray his Trust, shall be punished with Death, or such other Punishment as the Court Martial shall impose.

* *Leg. milit.*
D. de re milit.
Refus Leg. mi-
litar, cap. 15.
Artic. 22.

XXII. Soldiers and Mariners owe all Respect and Duty to their Superior Officers; and therefore when they are in Anger they ought to avoid them; but above all not to quarrel with, or give them any provoking Language: And therefore by the Law of Arms, a Soldier who hath resisted his Captain, willing to chastise him, if he hath laid hold on his Rod, is cashiered, if he purposely break it, or laid violent Hands upon his Captain, he dies*: And by the Laws of England, if any Officer, Mariner, Soldier, or other Person in the Fleet, shall strike any of his superior Officers, or draw, or offer to draw, or lift up any Weapon against him, being in the Execution of his Office, on any Pretence whatsoever, he shall suffer Death; and if

if any Officer, &c. shall presume to quarrel with any of his superior Officers, being in the Execution of his Office, or shall disobey any lawful Command of any of his superior Officers, he shall suffer Death, or such other Punishment, as shall, according to the Nature and Degree of his Offence, be inflicted upon him by the Sentence of a Court Martial.

XXIII. And though Mariners and Soldiers may have just cause of Complaint, as that their Victuals or Provisions are not good, yet must they not mutiny or rebel, whereby to distract or confound the whole Crew, but must make a civil and humble Address to their Commander, that the same may be amended; and if the Case be such, that the Commander cannot redress the same, by going to Port to supply the Exigencies, without Detriment of the Fleet, (as if ready to engage, or the like) they must, like Men and Soldiers, bear with the Extremity, considering that 'tis better that some Men should perish, nay the whole Crew in one Ship, than the whole Fleet; nay, perhaps the whole Kingdom be destroyed: And therefore, if any Person in the Fleet shall find Cause of Complaint of the unwholesomeness of the Victuals, or upon other just Ground, he shall quietly make the same known to his Superior or Captain, or Commander in Chief, as the Occasion may deserve, that such present Remedy may be had as the Matter may require; and the said Superior, &c. shall, as far as he is able, cause the same to be presently remedied; and no Person upon any such or other Pretence, shall attempt to stir up any Disturbance, upon pain of such Punishment as a Court Martial shall think fit to inflict, according to the Degree of the Offence.

Bacon's Max-
im, fol. 17.
Privilegium
non valet con-
tra rempubli-
cam.

Artic. 21.

XXIV. And

Artic. 24.

XXIV. And the Law doth provide, that there shall be no wasteful Expence of any Powder, Shot, Ammunition, or other Stores in the Fleet, nor any Embezzlement thereof, but the Stores and Provisions shall be carefully preserved, upon pain of such Punishment to be inflicted upon the Offenders, Abettors, Buyers and Receivers (being Persons subject to Naval Discipline) as shall be by a Court Martial found just in that behalf. In Fights, and when great Fleets are out, there are generally Instructions appointed for all Masters, Pilots, Ketches, Hoyes, and Smacks, who are to attend the Fleet, and to give them notice of the Roads, Coasts, Sands, Rocks, and the like; and they have particular Stations allotted them, and Orders given, that if they shall find less Water than such a proportion, they then give a Signal as they are directed to give, and continue their Signal till they are answered from the Capital Ships.

But in time of Fight they generally lay away their head from the Fleet, and keep their lead; and if they meet with such a Proportion of Water as is within their Directions, they are to give such Signal as they receive Orders for, and stand off from the danger.

Artic. 25.

Every Person in the Fleet, who shall unlawfully burn or set Fire to any Magazine or Store of Powder, or Ship, Boat, Ketch, Hoy or Vessel, or Tackle or Furniture thereunto belonging, not then appertaining to an Enemy, Pirate, or Rebel, shall suffer Death.

Artic. 23.

XXV. There are other Faults often committed by the Crew, the which the Law does punish. If any Person in the Fleet shall quarrel or fight with any other Person in the Fleet,

or

or use reproachful or provoking Speeches or Gestures, tending to make any Quarrel or Disturbance, he shall suffer such Punishment as the Offence shall deserve, and a Court Martial shall impose.

All Murders committed by any Person in the Artic. 28.
Fleet, shall be punished with Death.

If any Person in the Fleet shall commit the Artic. 29.
unnatural and detestable Sin of Buggery or Sodomy with Man or Beast, he shall be punished with Death.

All Robbery committed by any Person in the Artic. 30.
Fleet, shall be punished with Death, or otherwise, as a Court Martial, upon Consideration of Circumstances, shall find meet. And when any Persons have committed any of the Offences particularly mentioned in the Statute of 22 Geo. 2. c. 33. or any others, and for the which they shall be committed.

No Provost-Martial belonging to the Fleet, Artic. 32.
shall refuse to apprehend any Criminal, whom he shall be authorized by legal Warrant to apprehend, or to receive or keep any Prisoner committed to his Charge, or wilfully suffer him to escape, being once in his Custody, or dismiss him without lawful Order, upon pain of such Punishment as a Court Martial shall deem him to deserve; and all Captains, Officers, and others in the Fleet, shall do their endeavour to detect, apprehend, and bring to Punishment all Offenders, and shall assist the Officers appointed for that Purpose therein, upon pain of being proceeded against, and punished by a Court Martial, according to the Nature and Degree of the Offence.

Every Person being in actual Service and full Artic. 34.
Pay, and part of the Crew in or belonging to any of His Majesty's Ships or Vessels of War,
who

who shall be guilty of Mutiny, Desertion or Disobedience to any lawful Command, in any Part of His Majesty's Dominions on Shore, when in actual Service relative to the Fleet, shall be liable to be tried by a Court Martial, and suffer the like Punishment for every such Offence, as if the same had been committed at Sea on board any of His Majesty's Ships or Vessels of War.

Artic. 35.

If any Person, who shall be in the actual Service and full Pay of his Majesty's Ships and Vessels of War, shall commit upon the Shore, in any Place or Places out of His Majesty's Dominions, any of the Crimes punishable by these Articles and Orders, the Person so offending shall be liable to be tried and punished for the same, in like Manner to all Intents and Purposes, as if the said Crimes had been committed at Sea on board any of His Majesty's Ships or Vessels of War.

Touching the Punishments that the Roman Generals used to their Soldiers, when they were at a Court Martial found faulty, they were commonly proportioned according to the Offence committed: Sometimes they were easy, of which sort were those which only branded the Soldier with Disgrace; others were those that came heavy on the Person or Body. To the first belonged a shameful discharging or cashiering a Mariner or Soldier from the Army, and generally looked on as a matter of great Disgrace, which Punishment remains at this day for Offences as well in England as in most parts. A second was by stopping of their Pay; such Soldiers which suffered this kind of mulct, were said to be *Ære diruti*, for that *Æs illud diruebatur in fiscum, non in Militis sacculum*; the which is, and

*Ignominiosa
dimissio.*

*Fraudat stipendii. Rosin.
Ant. Rom. l.
10. c. 25.*

and may at this day be inflicted, especially on such as shall wilfully spoil their Arms, and for the like sort of Offences. A third was, a Sentence enjoined on a Soldier to resign up his Spear; for as those which had atchieved any Noble Act, were for their greater Honour *Hasta pura donati*, so others for their greater Disgrace were enforced to resign up that Military Weapon of Honour. A fourth sort of Punishment was, that the whole *Cohort*, which had lost their *Banners* or *Standards*, either in the Fields or at Sea, were enforced to eat nothing but Barley-bread, being deprived of their allowance in Wheat, and every *Centurion* in that *Cohort* had his Soldier's Belt or Girdle taken from him, which was no less Disgrace among them, than the degrading (among us) one of the *Order of the Garter*: For petty Faults they generally made them stand bare-footed before the *General's Pavilion*, with long Poles of Ten Foot in length in their Hands, and sometimes in the sight of the other Soldiers to walk up and down with Turf, on their Necks, and sometimes carrying a Beam like a Fork upon their Shoulders round the Town. The last of their Punishments was, the opening of a Vein, or letting them Blood in one of their Arms, which generally was inflicted on them who were too hot and bold.

The great Judgments were, to be beaten with Rods, which was generally inflicted on those who had not discharged their Office, in the sending about that *Table* called *Tessera*, wherein the Watch-word was written, or those who had stolen any thing from the Camp, or that had forsaken to keep Watch, or those that

*Lips. de milit.**Rom. lib. 5.**Dialog. 18.*

that had borne any false Witness against their Fellows, or had abused their Bodies by Women, or those that had been punished thrice for the same Fault, sometimes they were sold for Bond-slaves, beheaded and hanged. But the last, which was in their Mutinies, the Punishment fell either to Lots, as the Tenth, Twentieth, and sometimes the Hundreth Man, who were punished with Cudgelling; and with these Punishments those in *England* have a very near affinity, as cleansing the Ship, losing Pay, ducking in the Water, beaten at the Capson's-head, hoisted up the main Yard end with a Shovel at their Back, hanged, and shot to Death, and the like.

See 22 Geo. 2.

c. 33.

37 H. 6. fol.

4. 5.

XXVI. The *Admiral* may grant Commissions to inferior *Vice-Admirals* or *Commanders in Chief* of any Squadron of Ships, to assemble *Court-Martials*, consisting of *Commanders* and *Captains*, for the Trial and Execution of any of the Offences or Misdemeanors which shall be committed at Sea; but if one be attainted before them, the same works no corruption of Blood or forfeiture of Lands; nor can they try any Person that is not in actual Service and Pay in *His Majesty's* Fleet and Ships of War. But in no case where there is Sentence of Death, can the Execution of the same be without leave of the *Lord Admiral*, if the same be committed within the narrow Seas: Yet this does not extend to Mutiny, for there in that case the Party may be executed presently.

All Offences committed in any Voyage beyond the narrow Seas, where Sentence of Death shall be given upon any of the aforesaid Offences, Execution cannot be awarded
nor

nor done, but by the Order of the Commander in Chief of that Fleet or Squadron, wherein Sentence of Death was passed.

XXVII. The Judge-Advocate, or his Deputy, hath Power given by the words of the *Statute*, to administer an Oath, in order to the Examination or Trial of any of the Offences mentioned in the *Statute* of 22 *Geo. 2. c. 33.* and in his Absence the *Court Martial* hath Power to appoint any other Person to administer an Oath to the same purpose. This *Statute* enlarges not the Power and Jurisdiction of the *Admiral*, any further than only to the above-mentioned Offences, in any case whatsoever, but leaves his Authority as it was before the making of this *Statute*. Nor does it give the *Admiral* any other or further Power to enquire and punish any of the above-mentioned Offences, unless the same be done upon the main Sea, or in Ships or Vessels being and hovering in the main Stream of great Rivers, only beneath the Bridges of the same Rivers nigh to the Seas, within the Jurisdiction of the *Admiralty*, and in no other place 15 R. 2. cap. 3. whatsoever.

XXVIII. As Soldiers and Mariners for the Honour and Safety of the Realm, do daily expose their lives and limbs, so the Realm hath likewise provided for them, in case they survive, and should prove disabled or unfit for Service, a reasonable and comfortable Maintenance to keep them; the which the Justices of the Peace have power yearly in their *Easter Sessions* to raise by way of a Tax, for a weekly relief of maimed Soldiers and Mariners. Stat. 43 Eliz. cap. 3. & Vide 13, 14. C. 2. c. 9. 7, 8 W. 3. c. 21. 2, 3. A. c. 6. where- by Provision is made for the Widows and Orphans.

The maimed Soldier or Mariner must repair to the *Treasurer* of the County where he

was pressed, if he be able to travel, if he be not, then to the *Treasurer* of the County where he was born, or where he last dwelt by the space of three Years; but if he prove unable to travel, then to the *Treasurer* of the County where he lands.

He must have a Certificate under the chief Commander, or of his Captain, containing the Particulars of his Hurt and Services.

The Allowance to one not having been an Officer, is not to exceed Ten Pounds *per Annum*;

Under a Lieutenant — 15

A Lieutenant — — 20

Till the Mariner arrives at his proper *Treasurer*, they are to be relieved from *Treasurer* to *Treasurer*; and when they are provided for, if any of them shall go a begging or counterfeit Certificates, they shall suffer as common Rogues; and lose their Pensions: Over and above this Provision, *His Sacred Majesty George the First* provided a further Supplement for his maimed Mariners and Soldiers disabled in the Service, which is issued out at the *Chest* at *Chatham*, and constantly and duly paid them; and for his Commanders, Officers, and others that served abroad, he, of his Royal Bounty, hath given to those that bear the Character of War, and purchase the same by their Fidelity and Valour, a pious Bounty called *Smart-Money*, over and above their pay; and laid the Foundation of an *Hospital* at *Chelsea*, in his Life-time, which his late Sacred Majesty *George the Second* compleated, and endowed,

See Stat. 28
Geo. 2. c. 1.

ed, both for Beauty and Magnificence; excelling all in *Christendom*.

Nor must we forget that noble Hospital at *Greenwich*, which for a further Encouragement for Mariners, maimed or worn out with Age, or any other Infirmary, in the Sea Service, our late most glorious Deliverer King *William the Third*, was graciously pleased to give as a Royal Bounty a stately Palace at *Greenwich* for an Hospital, which is since so enlarged as to receive a thousand Seamen, and when compleat will be able to receive five hundred more; which for Stateliness and Grandeur, I may venture to say, will exceed any thing of its Kind that *Christendom* can produce.

See Stat. 7. 8
8 W. 3. c. 21.
S. 10. 8 9
W. 3. c. 23.
12 13 W.
3. c. 13. 2 3
3 An. c. 6. S.
19. 4. An. c.
12. S. 14. 6
An. c. 13. S.
11. 10 An. c.
17. S. 9. 20.
1 Geo. 2. c. 31.
2. c. 9. 2 Geo.
2. c. 7. c. 36.
S. 10. 6 Geo.
2. c. 25. S.

10. 8 Geo. 2. c. 29. 11 Geo. 2. c. 30. 13 Geo. 2. c. 4.
Geo. 2. c. 31. 20 Geo. 2. c. 24. S. 15. 17. 22 Geo. 2. c. 52. 25 Geo. 2.
c. 42. 27 Geo. 2. c. 10. S. 7. 28 Geo. 2. c. 22. S. 14. 29 Geo. 2. c. 29.
S. 8. 30 Geo. 2. c. 26. S. 9. 3 Geo. 2. c. 16.

A very laudable Undertaking must not be omitted; being a generous and voluntary Subscription by all the Officers of the Navy, allowing Three-pence in the Pound to be deducted out of their Wages for the Maintenance of the Widows and Orphans of such Commission and Warrant-Officers, who died since the 30th of *August 1732*, from which time it commences; which his late Majesty King *George II.* was graciously pleased to encourage by the granting his Royal Commission, bearing Date the 30th of *August 1732*, by which a comfortable Maintenance is secured by the following Allowance.

Widow of the	Captain	}	45 l. per Annum.
	Lieutenant		
	Master	}	30
	All other Warrant Officers.		
			20

The greatest assurance of a Fleet is in the prudent Government of the *Admiral*; the greatest weakening of it is by discontent, which generally proceeds from two things, want of good Victuals at Sea, and Pay when come home, these are the poor Mariners *Aqua vitae*; but want of them is such an *Aqua fortis*, as eats thro' all manner of Duty and Obedience: That Prince that expects to be well served and obeyed, (especially by an *Englishman*) must take care that he suffer not a greater Power in his Fleet than his own; this Commander is Necessity, which breaks Discipline at Sea, and creates Discouragement at Land.

*Vide Salmuth
in Pancir. Leg.
verum depræd.
Ga. de Tri-
umph. Dion.
Halicarnas.
lib. 5.*

XXIX. The Wisdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their Return, of which they had various sorts; but the greatest was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the best of the *Romans* meeting him, his Soldiers (especially those who by their Valour had purchased Coronets, Chains, and other Ensigns of reward for their Conduct and Courage) following him: But what alas! could these to the more sober represent any other but horror, since the Centers from whence the Lines were drawn, could afford nothing but Death, Slaughter and Desolation on those who had the Souls and Faces of Men; and if it were possible, that the Blood which by their Commissions was drawn from the sides of Mankind, and for which they made those Triumphs, could have been brought to *Rome*, the same was capable of making of a Source great as their *Tiber*; but *Policy* had need of all

all its Stratagems to confound the Judgment of a Soldier by excessive Praises, Recompences and Triumphs, that so the Opinion of Wounds and wooden Legs might raise in him a greater Esteem of himself, than if he had an entire Body. To allure others, something also must be found out handsomely to cover wounds and affrightments of Death; and without this *Cæsar* in his Triumph, with all his Garlands and Musick, would look but like a Victim; but what sorrow of Heart is it to see passionate Man, a Ray of Divinity, and the Joy of Angels, scourged thus with his own Scorpions? The cholerickness of War (whereby the lustful heat of so many Hearts is reduced) stirs up the Lees of Kingdoms and States, as a Tempest doth weeds and slimy sediment from the bottom to the top of the Sea, which afterwards driven to the Shore, together with its Foam, there covers Pearls and precious Stones: And tho' the Cannon should seem mad by its continual firing, and the Sword reeking hot by its daily slaughters, yet no good Man doubts but they, even they, shall weather out those Storms, and in the midst of those merciless Instruments find an *inculpata Tutela*, who love Justice, exercise Charity, and put their Trust in the *Great Governor of all things*.

C H A P. XIV.

Of Salutations by Ships of War, and Merchant Men.

- I. Of Salutations paid in all Ages as an undoubted Mark of Sovereignty of this Empire.
- II. Of those Seas where this Right is to be paid to the King of England's Flag.
- III. In what manner the King of England holds this Right, and by whom to be paid.
- IV. Of those that shall neglect or refuse to do the same, how punished and dealt withal.
- V. Where His Majesty of Great Britain's Ships are to strike their Flag, and where not.
- VI. Of the saluting Ports, Castles, and Forts, how the same is to be done, and on what Terms.
- VII. Of Ships of War, their saluting their Admiral and Commanders in Chief.
- VIII. Of Ambassadors, Dukes, Noblemen, and other Persons of Quality, how to be saluted coming aboard and landing.
- IX. The Admiral of any Foreign Nation, if met withal, how to be saluted and answered.
- X. Of the Men of War or Ships of Trade of any Foreign Nations, saluting His Majesty's Ships of War, how to be answered.
- XI. Of the saluting of His Majesty's own Ports and Castles, and when the Salute ceases.
- XII. Of the Objection that seems to be made against the Necessity of such Salutations.
- XIII. Why Kingdoms and States attribute the Effects, not the cause of Rights, to prescription.
- XIV. That Kingdoms and Republicks ought not to be disordered for the Defect of Right, in presumption, and the Objection in the XII §. answered.
- XV. The Inconveniency of War, and the Causes justifying the same.
- XVI. Of the Causes not justifiable in War.
- XVII. Of Moderation, and the utility of Faith and Peace.

I. **I**T is evident by what hath been said, that the *British Seas*, before the Roman Conquest,

Conquest, ever belonged to the *Isle of Great Britain*, they always claiming and enjoying the sole Dominion and Sovereignty of the same, which afterwards accrued to the *Romans* by Conquest, and from them translated with its *Empire* to the succeeding *Saxon, Danish, and Norman Kings*; and in the Reigns of those Princes there were always some marks of Sovereignty paid, wherein the Right of the same was evinced and acknowledged.

II. Now those Seas in which this Salutation or Duty of the Flag are to be paid, are the four circumjacent Seas, in which all Vessels whatsoever are to pay that Duty, according to the Custom of the same, and the Ordinance of King *John*. How far this Right is payable, appears in the Fourth Article in the Peace between His Majesty and the States-General of the United Provinces, in those words:

That whatever Ships or Vessels belonging to the said United Provinces, whether Vessels of War or other, whether single or in Fleets, shall meet in any of the Seas from Cape Finisterre to the middle Point of the Coast Van Staten in Norway, with any Ships or Vessels belonging to His Majesty of Great Britain, whether those Ships be single or in great number, if they carry His Majesty of Great Britain's Flag or Jack, the aforesaid Dutch Vessels or Ships shall strike their Flag and lower their Top-sail in the same Manner; and with as much Respect as hath at any Time, or in any Place, been formerly practised, towards any Ships of His Majesty of Great Britain, or his Predecessors, by any Ships of the States-General, or their Predecessors.

III. Now His Majesty holds not this Salutation or Respect, by virtue of the League of the

the Article, but as the same is a RIGHT inherent to the *Empire of Great Britain*; and therefore in the first part of the Article it is declared in these Words:

— *That the aforesaid States General of the United Provinces, in due Acknowledgment on their Part of the King of Great Britain's RIGHT to have his Flag respected in the Seas hereafter mentioned, shall and do declare, and agree.* —

*Selden Mare
Claufum lib.
2. cap. 23.*

Now this Right extends and subjects all Nations whatsoever that shall pass through those Seas, and between those Places, meeting with any of His Majesty's Ships of War, bearing his Flag, Jack, or Cognizance of Service, to strike their Top-sail, and take in their Flag, in acknowledgment of His Majesty's Sovereignty in those Seas; and if any shall refuse to do it, or offer to resist, they may be compelled, *vi, & manu forti*, for His Majesty's Honour is by no means to receive the least Diminution.

IV. If therefore any of His Majesty's Subjects should be so negligent or forgetful to pay that Obedience, when it may be done without loss of the Voyage, they are to be seized on, and brought to the Flag, to answer the Contempt, or else the Commander may remit the Name of the Ship, Commander or Master, as also the Place from whence, and the Port to which she shall be bound, to the Admiral; however, before she is dismissed, she must pay the Charge of the Shot that her Negligence or Forgetfulness occasioned, and afterwards may be indicted for the same, and severely punished.

V. In His Majesty's Seas, none of his Ships of War are to strike to any; and in no other
Part

Part is any Ship of His Majesty to strike her Flag or Top-sail to any Foreigner, unless such Foreign Ship shall have first struck, or at the same time have struck her Flag or Top-sail to His Majesty's Ships.

VI. But if any of the King of *England's* Ships of War shall enter into the Harbour of any Foreign Prince or State, or into the Road within shot of Cannon of some Fort or Castle, yet such Respect must be paid, as is usually there expected, and then the *Commander* is to send ashore to inform himself what return they will make to his Salute; and that if he hath received good Assurance, that His Majesty's Ships shall be answered Gun for Gun, the Port is to be saluted, as is usual; but without assurance of being answered by an equal number of Guns, the Port is not to be saluted. And yet in that very respect before the Port is to be saluted, the Captain ought to inform himself, how Flags (of the same quality with that he carries) of other Princes have been saluted there, the which is peremptorily to be insisted on, to be saluted with as great Respect and Advantage as any Flag (of the same quality with the Captains) of any other Prince hath been saluted in that place.

VII. A Captain of a Ship of a second Rate, being neither Admiral, Vice-Admiral, nor Rear-Admiral, at his first coming and saluting his Admiral or Commander in Chief, is to give Eleven Pieces, his Vice-Admiral Nine, and his Rear-Admiral Seven, and the other proportionably less by two, according to their Ranks; but the Commander or Captain of a *Artic. 38.* Ship is not to salute his Admiral or Commander in Chief, after he had done it once, except

except he hath been absent from the Flag Two Months.

VIII. When a Ship of the second Rate shall carry any Ambassador, Duke or Nobleman, at his coming aboard he is to give Eleven Pieces, and at his Landing Fifteen; and when he shall carry a Knight, Lady or Gentleman of Quality, at their coming aboard he is to give Seven, and at their Landing Eleven; and the other Ships are to give less by two, according to their Ranks and number of Ordinance.

IX. When an Admiral of any Foreign Nation is met with, he is to be answered with the like Number by all the Ships he shall salute; if a Vice-Admiral, the Admiral is to answer him with twelve less; but the Vice-Admiral and Rear-Admiral, and as many of the rest as he shall salute, shall give him the like Number; if a Rear-Admiral, then the Admiral and Vice-Admiral to answer him with two less; but if he shall salute the Rear-Admiral or any other, they are to answer him in the like Number.

X. When a Man of War or Merchant Man of another Nation, or of our own, salutes any of the King's Ships, he is to be answered by two less.

XI. When any of the Captains of his Majesty's Ships shall have occasion to salute any of the King's Castles, he is to give two Guns less than they are directed to give upon saluting their Admiral or Commander in Chief, as aforesaid: But this extends only to time of Peace; for if War is begun, no Guns ought to be fired in Salutes, unless to the Ships or Castles of some Foreign Prince or State in Amity.

XII. Those

XII. Those Duties or Obligations being laid on *Commanders*, they consist of two parts; the one is that antient prescription, which the *Crown of England* claims by virtue of the *Sovereignty* of that *Empire*; the other is but that *Respect* which is paid as visible Marks of *Honour* and *Esteem*, either to Kingdoms or Persons publick or private, to whom these several Commands are to be observed; and yet in these, which are both innocent and harmless of themselves, we want not those, who being empty of all that may be called Good, want not malice to start up words, *Wherefore should the Lives of Men, even Christian Men, be exposed to Death and Slaughter for Shadows* (as they call them) *the Right of Salutation* or Compliment being no other in their Opinion.

XIII. Admitting therefore that the Evidence of original Compacts and Rights stand at such remote distances from us, that they are hardly discernable, and that the principal of Civil Things, as well as Natural, is sought for in a Chaos or Confusion; so that the Evidence of antient Facts *vestigia nulla retrorsum*, there being no infallible marks of their pre-existence (one step doth so confound and obliterate another) and that time itself is but an imagination of our own, an intentional, not a real measure for actions, which pass away concomitantly with that measure of time in which they were done, for which reason we talk of antient Things, but as blind Men do of Colours: Notwithstanding Prescription is supposed by most to hold out such an Evidence, that as they say, it ought to silence all Counterpleas in all Tribunals, and by the present allowance which is indulged to it, it either proves a good, or cleanses a vitiated Title;

Coke on Littleton, fol. 113, 114.

Title; and hath this Power in the Civil Constitution of the World, that for Quietness sake what it cannot find, we grant it a Power to make.

And if we examine all this strictly at the two great Tribunals, the external and the internal, and argue the *Jus* of it, as Statesmen and Lawyers do, we can then raise the Argument of it no higher in the external or temporal Court, than only this — *That it is very convenient it should have the effects of Right; lest Properties and Dominion of things should be uncertain, and by the apparent negligences of Time Owners should be punished; and that Controversies may have a speedy end.* States looking more after publick repose and quiet than after strict Virtue; and more after those things which are *ad alterum*, than that which concerns a Man's own self; for, say they,

Deorum injuriæ Diis curæ.

The Gods look well enough after their own Injuries. States meddle not so much with great Prodigalities as in petty Larcenies, *our chiefest Liberty, Privileges, or Prerogative in this World, consisting only in an uncontroulable Right, which we have to undo ourselves, if we please.* Certainly if we plead at the other Tribunal, as conscientious Lawyers, we must give our ultimate Resolution out of that Law, *Quæ inciditur non ære, sed animis:* Which is not engraved in Tables of Brasses, but in the Tables of our Souls; for the Rule of Law tells us, *Quæ principio vitiantur, ex post facto reconvolescant,* and that prescription or usucaption (which is but the lapse of so much Time) hath the power to make *Wrong a Right*; yea, to change the morality of an Action, and turn Quantity into Quality: Upon the Result of all which taking for granted, what those

those stubborn People do hold, that instead of being a Right, or a certain Cause or Proof of it, it only makes a shadow or an opinion of Right.

XIV. And when we have taken those People by the hand, and with eagerness run with them to the very bottom and end of the line, and there find nothing, we are but in *Pompey's* Astonishment, when after his Conquest of *Jerusalem*, when he had with such reverence and curiosity visited the *Sanctum Sanctorum*, and found nothing there but a pair of Candlesticks and a Chair, in which there was no God sitting; yet for all this Mistake, he would not (as *Josephus* saith) disorder or rob the Temple, which he took by force of Arms, because *the very Opinion of Religion bath something of Religion*; (which made *Jacob* accept of *Laban's* Oath by an *Idol*) so ought not we for defect of giving the Causes of the Inception of Prescription, or of the Right in Prescription disorder a State, or be the occasion of setting of two Nations at Enmity; nay, though in Conscience we are satisfied that it contains but the Opinion or Shadow of Right: And as to the involving the Lives of the Innocent, there is no such thing in the matter, for there is not required any thing which they do not owe, nor are they designed to Death; but if the Cause be such, that they that are Innocent must perish, that is, be exposed to Death by their Rulers, because they obstinately will not yield that which is right, but will involve the Lives of their innocent Subjects by Force, to defend that which is wrong, such guilty Governors must answer for the Defect of their own evil Actions: On the other hand, there

Machiavel's
Discourses,
cap. 11.

can

can be no doubt made, but he that hath an undoubted Right, being a Sovereign, the Subjects partake in the same, and the Indignity offered to him, they immediately become Partakers in the Suffering, for the Satisfaction of which they may, yea, are obliged both by the Law of God and Nations to seek Reparation (if their Prince shall command) *vi, & manu forti*, by the Hazard of their Blood and Lives.

XV. On the other hand, as War introduces the greatest of Evils, *viz.* the taking away of Men's Lives, and that which is equivalent to Life; so right Reason and Equity tells us, that it ought not to be undertaken without the greatest Cause, which is the keeping of our Lives, and that without which our Lives cannot be kept; or if they should be kept, yet they would not be of any value to us, seeing there may be a Life worse than Death, even Captivity; wherefore as we are forbidden to go to Law for a little Occasion, so we are not to go to War, but for the greatest. Now those things that are equivalent to a Man's Life, are such to whom *Almighty God* appointed the same equal Punishment as to Murderers, and such were breakers into Houses, breakers of Marriage-fidelity, Publishers of false Religion, and those who rage in unnatural Lusts, and the like.

However, before Men's Persons or Goods are to be invaded by War, one of these three Conditions is requisite.

1. Necessity, according to the tacit Contract in the first dividing of Good, as hath been already observed.

2. A Debt.

3. A Man's ill Merits, as when he doth great Wrong, or takes part with those who do it.

Against

Against which if any thing is committed, War may be commenced, nor is the same repugnant to the Laws of Nature; that is, whether the thing may not be done unjustly, which hath a necessary Repugnance to the rational and social Nature; amongst the first Principles of Nature, there's nothing repugnant unto War; on the other hand, there is much in favour of it, for both the end of War, the Conservation of Life and Members, and the keeping and acquiring of things useful unto Life, is most agreeable to those Principles; and if need be, to use Force to that Purpose is not disagreeable, since every living thing hath by the Gift of Nature Strength, to the end it may be able to help and defend itself. Besides, Reason and the Nature of Society, inhibits not all Force, but that which is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that every one may enjoy his own; this ought to be, and would have been, though the Dominion and Property of Possessions had not been introduced; for Life, Members and Liberty would yet be proper to every one; and therefore without Injury could not be invaded by another: To make use of what is common, and spend as much as suffices Nature, would be the right of the Occupant, which Right none could without Injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commission from GOD, and yet was approved by him; therefore the Law of Nature was his Warrant, whose Wisdom was no less eminent than his Sanctity, even by report of *Heathens*, *Berosus*, and *Orpheus*; nor is the same repugnant to the

*Ulpian Leg. 1.
Sect. vim. vi.
D. de vi, &
vi arma.*

Hebrew

• *Lib. 1.*• *cap. 1.*

Hebrew Law or Gospel, as the same is most excellently proved by the *Incomparable Grotius*.

Victor. de Ind.
rel. 1. n. 31.

Victor de Jure
Bell., n. 5,
6, 7, 8.

XVI. On the other hand, the Fear of uncertain Danger, as building of Forts, Castles and Ships, and the like, though the former be on Frontiers, the refusing of Wives (when others may be had) the changing of Countries either Barren or Moorish for more fertile or healthful which may justly be done; as in the Case of the old *Germans*, as *Tacitus* relates: So likewise to pretend a Title to a Land, because it was never found out or heard of before; that is, if the same be held by a People that are under a Government; nay, though the Government be wicked or think amiss of GOD, or be of a dull Wit; for Invention is of those things that belong to none; for neither is moral Virtue, or Religion, or Perfection of Understanding required to Dominion; but yet if a new Place or Land shall be discovered, in which are People altogether destitute of Reason, such have no Dominion, but out of Charity only is due unto them what is necessary for Life; for such are accounted as Infants or Madmen, whose Right or Property is transferred, that is, the use of the same, according to the Law of Nations; in such Cases a charitable War may be commenced.

XVII. To prevent all the sad Calamities that must inevitably follow the ungoverned Hand in War, Faith must by all Means be laboured for; for by that, not only every Common-Wealth is conserved, but also that greater Society even of Nations, that once being taken away, then farewell Commerce, for that must be then taken away from Man; for Faith is the most sacred Thing that

is seated in the Breast of Man, and is so much more religiously to be kept by the supreme Rulers of the World, by how much more they are exempted from the Punishment of their Sins here than other Men; Take away Faith, and then Man to Man would be (as Mr. *Hobbes* observes) even Wolves; and the more are Kings to embrace it, first for Conscience, and then for Faith and Credit sake, upon which depends the Authority of their Government. The Ambassadors of *Justinian* addressed their Speech to *Chosroes* after this manner: *Did not we see you here with our Procopius Per-*
own Eyes, and pronounce those Words in your sic. 2.

Ears, we should never have believed that Chosroes, the Son of Cabades, would bring his Army, and enter forcibly into the Roman Bounds, contrary to his Leagues, the only hope left to those that are afflicted with War? For what is this, but to change the Life of Men into the Life of wild Beasts? Take away Leagues, and there will be eternal Wars, and Wars without end will have this Effect, to put Men beside themselves, and divest them of their Nature. If then a safe Peace may be had, it is well worth the releasing of all or many Injuries, Losses, and Charges, according to that in Aristotle: Better it is to yield some of our Goods to those that are more Potent, than contend with them and lose all; for the common Chances of War must be considered, which if so, the Scope of the principal Part of this First Book may be avoided, and we let into the peaceable Track of Traffick and Commerce.

END of the FIRST BOOK.

B O O K II.

C H A P. I.

Of the various Rights and Obligations
of Owners and Partners of Ships in
Cases private.

- I. *Of Navigation in general.*
- II. *Of Owners, their several Powers over those Vessels they are Partners in. Trower for a part of a Ship.*
- III. *Where Ships are obliged to make a Voyage before they can be sold; and what may be done when part protest against a Voyage.*
- IV. *The Master how brought in by the Owners, and the reason why in such a Manner.*
- V. *Where the Owners ought to be repaired for the Damages of the Master.*
- VI. *Where Ships broke in pieces determine the Partnership as to the Vessel, and where not.*
- VII. *Where a Ship shall be the Builder's, and where only his whose Materials she was erected with.*
- VIII. *Where Property of the Vessel altered changes not that of the Boat.*
- IX. *A Ship for the act of Piracy becomes forfeited; yet if bona fide sold, where the Property may be questioned.*
- X. *Monies borrowed by the Master, where the same obliges the Owners, and where not.*
- XI. *Whether he that obtains an unlawful Possession of a Ship, shall answer the full Freight to the Owners.*
- XII. *And where the Owners shall have their Freight, though they lose their Lading.*
- XIII. *Where a Ship may become a Deodand, and where not. Not forfeited till Condemnation.*
- XIV. *How recoverable by the Laws of England.*
- XV.

XV. *Foreign Ship naturalized upon Sale needs not to make Oath again upon the New Act.*

XVI. *Forfeitures for delivering Goods without paying the Duties.*

I. IN the precedent Book having observed something of the Rights of Persons and of Things in a State of *Nature*, and how necessarily they came at first to be appropriated, and how equitably they are now continued in the possession of those to whom they are consigned by the *donation* of others, by the *Laws of Nations*, and maintained or destroyed by the equity of those various Laws which rule and govern them in reference to Matters *publick*, all which is justified by the Scripture itself: It may not now seem improper to examine the *private causes* changing the same, and of the contingencies and advantages that wait on that which we properly call Commerce.

The Great Creator having finished his Mighty Work, and given Man that Dominion which he now enjoys, as well over the Fish in the Seas, as the Beasts in the Field, he was not forgetful of bestowing on him those things which were necessary for the Government and support of the same, creating at the same time Trees which grow as it were spontaneously into Vessels and Canoes; which wanted nothing but launching forth to render them useful for his accommodation, which afterwards he by his Divine Genius (inspired by that Mighty One) finding Materials, hath since so compleated and equipped, as to render it the most beautiful and stupendous Creature (not improperly so called) that the whole World can produce, which being not retarded by lett of Winds, or other contingent accidents, submits itself to plow

the unknown paths of that vast Element, to brave all Encounters of Waves and Rocks, to fathom and survey the vast immensities of the very World itself, to people, cultivate, and civilize uninhabited and barbarous Regions, and to proclaim to the Universe the Wonders of the *Architect*, the Skill of the *Pilot*, and, above all, the Benefits of *Commerce*; so that it is no wonder at this day to find Nations contending who should surpass each other in the Art of Navigation, and to monopolize, if possible, the very Commerce and Trade of the World into their hands; and that, all by the means of this most excellent Fabrick.

*Aretin. post
Joan. Faber.
in §. item ex-
ercitor. num.
3. Inst. de
oblig. quæ ex
quasi delict.*

II. Hence it is, that Ships and Vessels of that kind being originally invented for use and profit, not for pleasure and delight, to plow the Seas, not to lie by the Walls, to supply those of the Mountains, as well as those on the Sea Coasts.

Therefore upon any probable design the major part of the Owners may even *against the consent*, though not without the *privity* and knowledge of the rest, freight out their Vessel to Sea.

If it should so fall out that the major part *protest* against the Voyage, and but one left that is for the Voyage, yet the same may be effected by that Party, especially if there be *equality* in Partnership.

*Fitzgib. 192.
Houston v.
Hebdon, Trin.
18 and 19*

But the Admiralty compels them to give Security for her safe Return; and the Recognizance may be sued there.

Geo. 2. B. R. Degraeve v. Hodger. Pasch. 6 An. B. R. 1707. L. Raym. 223. 2d Edit. 2 L. Raym. 1285.

But where two Part-Owners sent out the Ship, without the Consent of the third, and she was lost; the third must bear his Proportion

tion of the Loss, because he would have had his Share of the Profits, if any. 1. Vern. 297. But note, in this Case there had been no previous Application to the Admiralty, as there ought to have been.

The Account of the Voyage settled by a Vern. 465. major part of the Part-Owners, binds the rest.

As an Encouragement to the Building of Ships being of that universal Advantage to the Publick in point of Trade, and Commerce, to contrive and vest the Owners propriety in them, both by the Common Laws of this Realm, and the Maritime Laws, it is provided, that in case a Ship be taken away or the Owners dispossessed, they may maintain an Action of Trover and Conversion for an 8th, a 16th, or any other Part or Share of the same.

In an Action on the Case, the Plaintiff declared that he was Owner of the 16th part of a Ship, and the Defendant Owner of another 16th Part of the same Ship, and that the Defendant fraudulently and deceitfully carried the said Ship *ad loca transmarina*, and disposed of her to his own use, by which the Plaintiff lost his 16th part to his Damage: On not guilty pleaded, and verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Action did not lie, for tho' it be found deceptive, yet this did not help it, if the Action did not lie on the subject matter; and here they are Tenants in Common of the Ship, and by *Littleton* between Tenants in Com-
tenants in Common of a Ship.
Ent. §. 323.
1 Inst. 199. b.
200. a.
Salk. 290.
392.
 mon there is not any Remedy, and there can-
 not be any fraud between them, because the
 Law supposes a trust and confidence betwixt
 them; and upon these Reasons Judgment
 was given *quod Querens nil capiat per billam.*
Graves against Sawcer, T. Raym. 15. Lev.

29. and 1 Keble 38. *Bennington* against *Bennington*. 3 Leon. 228.

Leg. Fin. C. §.
pro Socio &
poss. inst. &
D. eod.

Leg. in hoc pa-
rag. si conve-
niant pro Soc.

Bart. & Paul.
in Leg. hæc di-
stinctio §. cum
fundum ff.
locat.

Gloss. Leg. si
navis & juris
in Leg. utique
para culpa de
rei indic. &
Leg. arbori-
bus. §. navis
de usufruct.

Leg. non aliter
F. de usu &
habi.

III. Owners by Law can no ways be obliged to continue their paction or partnership without sundering; but yet if they will sunder, the *Law Marine* requires some considerations to be performed before they can do so. And therefore if the Ship be newly built, and never yet made a Voyage, or is newly bought, she ought to be subject to one Voyage upon the common out-read and hazard, before any of the Owners shall be heard to sunder and discharge their parts; but by the Laws of *England* the Owners may, before any such Voyage, sell or transmit their Right.

If it falls out that one is so obstinate that his Consent cannot be had, yet the Law will enforce him either to hold, or to sell his proportion; but if he will set no Price, the rest may out-rigg her at their own Costs and Charges, and whatsoever Freight she earns, he is not to have any Share or Benefit in the same. But if such Vessel happens to miscarry or be cast away, the rest must answer him his Part or Proportion in the Vessel.

But if it should fall out that the major Part of the Owners refuse to set out the Vessel to Sea, there by reason of the unequality they may not be compelled; but then such Vessel is to be valued and sold: The like where part of the Owners become deficient or unable to set her forth to Sea.

IV. The Master of the Vessel is eligible by the Part-Owners in Proportion, not by the Majority, and he that is most able is to be preferred. The Wisdom of the latter Ages have been such, that few have gone out in that condition, but those that have commonly had

had Shares or Parts in the same Vessel. In the preferring therefore of a Master, his Ability and Honesty is to be considered, since on him rests the charge not only of the Vessel, but of the Lading; their very Actions subjecting the Owners † to answer for all Damage that shall be sustained by him or his Mariners, be it in the Port or at Sea, to the Lading or Goods of the Merchant or Laders, and they are made liable as well by the Common Laws * of England, as the Law † Marine.

† 4 Inst. 146.
18 H. 8. n. 58.
* 2 Keb. Rep.
866. pl. 22.
Morfe v. Sluc.
† Nautæ
Caup. Stab.
Leg. 1. Sect. 3.

V. If the Master commits Offences either negligently or wilfully, he shall be responsible over to his Owners for the Reparation of Damage; nor are they bound to join, but may sever and sue apart as well by the Common Law * as the Marine: So likewise if the Ship hath earned Freight, and part of them receive their parts, the rest may bring their Action for their Share, without joining with the others.

* Stanley v.
Ayles.
3 Keble 444.

The Defendant and seven other Persons were Proprietors of a Ship, in which Goods were usually transported for hire, and the Plaintiff *onerat* Goods upon the Ship to be carried for Hire, from *London* to *Topsham*, in *Comitatu Devon*, and that the Defendant received them, and undertook to bring them to *Topsham*, but that he not being careful of his Duty, but neglecting it, *tam improvidentur* placed and carried the said Goods, that tho' the Ship safely arrived at *Topsham*, yet the Goods were spoiled: And upon *non culp.* pleaded, the Jury found a special Verdict, *viz.* That the Defendant and seven other Persons were Proprietors and Part-Owners of the Ship, that the Ship had a Master *locat* in her by the Part-Owners, who had 60*l.* Wages for every Voyage between *Topsham* and *London*.

Masters and
Owners re-
sponsible.

don, that the Goods were delivered to the Master, none of the Part-Owners being present, and that there was not any Contract made with them or any of them by the Plaintiff, that the Ship arrived safe to *Topsbam*, but the Goods were spoiled. *Et si pro Quer' pro Quer' si non pro Def.*

And two Points were made.

1. If the Proprietors are chargeable no Contract being made with them, and there being a Master that is chargeable in respect of his Wages, according to the Case of *Morse* and *Slue*, yet *per Holt Cb. Justice* clearly, that tho' the Master be chargeable in respect of his Wages, so are the Proprietors in respect of their Freight that they receive for the carriage of the Goods, at the Election of the Plaintiff.

2. If the Action lay against the Defendant alone, it appearing that there are other Part-Owners not made Defendants; and held that the Action did not lie against him sole, but ought to have been against all the Part-Owners, for all the Part-Owners are chargeable in respect of the Profit they make by the carriage of the Goods, and that in point of Contract upon their undertaking, be it implied or express, and are not chargeable as Trespassers, for then one might be chargeable alone, but in point of Contract upon their Receipt of the Goods to be carried for hire. Judgment *pro Defen.* as by 3 *Mod.* 321. *Boson con. Sanford* 3 *Levinz.* 258. where it is with a *Cur. advisare, mes le Reporter ut audivit* Judgment *pro Defen.*

Carthew 58
S. C.

Leg. inter stipulantem in §.

VI. If a Ship be broken up or taken in Pieces, with an intent to convert the same to other

other uses; if afterwards, upon Advice or *Sacram ff. de*
change of Mind, she be rebuilt with the same *ver. oblig.*
Materials, yet this is now another, and not
the same Ship, especially if the Keel be ript
up or changed, and the whole Ship be once
all taken asunder and rebuilt, there deter-
mines the Partnership *quoad* the Ship. But if *Leg. quod in §.*
a Ship be ript up in parts, and taken asun- *fin. F. de Leg.*
der in parts, and repaired in parts, yet she
remains still the same Vessel and not another;
nay, though she hath been so often repaired,
that there remains not one stick of the origi-
nal Fabrick.

VII. If a Man shall repair his Ship with *Leg. Musius ff.*
Plank or other Materials belonging to another, *de rei vindic.*
yet the Ship maintains and keeps her first
Owners.

But if a Man take Plank and Materials be- *ff. lib. 6. tit. 1.*
longing to another, and prepared for the use *leg. 61.*
of Shipping, and with them build a Ship, the
Property of the Vessel follows the Owners of
the Materials and not the Builder.

But if a Man cut down the Trees of ano- *Leg. si ex meis,*
ther, or takes Timber or Planks prepared for *ff. de acq. rer.*
the erecting or repairing of a Dwelling- *dom. § Leg. si*
House; nay, though some of them are for *convenerit §. si*
Shipping, and builds a Ship, the Property *quis sic. ff. de*
follows not the Owners but the Builders. *pign. act.*

VIII. If a Ship be sold together with her *Leg. Marcellus*
Tackle, Furniture, Apparel, and all other *in §. arma-*
her Instruments thereunto belonging, yet by *menta ff. de*
these Words the Ship's Boat is not conveyed, *rei vindicat.*
but that remains still in the Owners; so it is *† Rolls A:*
if the Ship be freighted out, and afterwards *bridg. 530.*
at Sea she commits Piracy, the Ship is for- *Bald. in Leg.*
feited, but the Boat remains still to the *cum proponas*
Owners *†. Cod. de Nau-*
tic. 2 favore,
num. 6.

And

And though Ballast is generally used in Shipping by those Ships that are freighted outwards, in order to bringing home of Goods, yet is not the same any part of the Furniture of the Vessel; and so it was adjudged in debt on Bond, The Condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if the Plaintiff shall enjoy the said Ship with all the Furniture belonging to the same, without being disturbed for the Ship or any Furniture appertaining to it, that then, &c. And the case fell out to be, that after the sale of the Ship, a Stranger sued the Plaintiff for certain Monies due for Ballast bought by the Defendant for the same Ship, in which Suit he obtained Sentence, upon which the Ship was seized, The Question was, If Ballast be Furniture for a Ship or not, it was resolved that it was not; for though it may be as necessary as Sails, yet it is not always so, for sometimes they sail without Ballast, for the Merchandize itself may be sufficient to answer that Purpose.

Linter's Case,
Leon. 46, 47.

Bingley's
Case, Rolls
Abridg. fol.
530.
Dig. lib. 14.
tit. 1. §. 17.

IX. If a Ship commits a Piracy, by reason of which she becomes forfeited, if before seizure she be *bona fide* sold, the Property shall not be questioned, nor the Owners divested of the same.

1. P. Williams
393, 394.

A Mortgagee of a Ship, by Deed, intrusts the Mortgager with the original Bill of Sale; the Mortgager indorses thereon subsequent Mortgages or Bills of Sale of several Parts of the Ship, the first Mortgagee acquiesces, he shall be postponed.

X. If a Master shall take up Monies to mend or victual his Ship where there is no occasion, though generally the Owners shall answer the fact of the Master, yet here they shall

shall not, but only the Master. But if there were cause of mending the Ship, though the Master spend the Money another way, yet the Owner and Ship become liable to the satisfaction of the Creditor; for it were very unreasonable that the Creditor should be bound to take upon him the care of repairing the Ship, and supply the Owners Room, which must be so, if it should be necessary for him, to prove that the Money was laid out upon the Ship; so on the other hand, it stands with reason that he be sure that he lends his Money on such an occasion, as whereby the Master's fact may oblige the Owners, which he cannot do otherwise, unless he knows that the Money borrowed was necessary for the repair of the Ship; and therefore if the Ship wanted some repairs, and far greater and more extravagant Sum was lent than was needful, the Owners shall not be liable for the whole.

Bridgman's Case, Hobart, fol. 11, 12. Moo. 918.

Gloss. African. super cod. leg. § 5.

The *East-India* Company's Agent in the *Indies* bought a Ship and her Cargo of the 395th Commander, who had no Power to sell her; the Owner had the Value decreed for Ship and Cargo (the Value being found by a Jury) and *Indian* Interest, viz. 12 l. per Cent.

XI. If a Man gets possession of a Ship having no Title to the same, by the Law Marine, he shall answer such Damage as the Ship in all probability might have earned; and the reason of that is, because the only end of Shipping is the Employment thereof; but if a Warrant be directed out of the Admiralty to the Marshal, to arrest such a Ship and *Salvo Custodire*, who by force of the same enters into the same Ship, though the Warrant does not mention that the Officer should carry away the Sails of the same Ship, yet he may

Dig. lib. 6. tit. 1. 62. § lib. 7. tit. 1. 12. §. 1. & Papi- nian on the same Law.

Creamer v.
Jockley,
Latch. 188.

may justify the taking the same, for that he cannot *Salvo Custodire* the same Ship, unless he carries away the Sails.

Digest. lib. 19.
tit. 2. 61.
Scævola on
the same Law.

XII. A Ship is freighted out, accordingly she receives in her Lading pursuant to Agreement, afterwards an Embargo happens, and the Laden is taken as forfeited, yet the Owners shall notwithstanding receive Freight, for here is no fault in them, but only in the Merchant.

3 Inst. fol. 58.

XIII. In *Aqua dulci* a Ship may become a Deodand, but in the Sea, or in *Aqua salsa*, being an Arm of the Sea, no Deodand of the Ship or any part of it, though any body be drowned out of it, or otherwise come by their Death in the Ship; because on such Waters, Ships and other Vessels are subject to such Dangers upon the raging Waves in respect of Wind and Tempest; and this Diversity all our antient Lawyers do agree in, and it does more

Rot. Parliam.
51 Ed. 3.
num. 73.
1 R. 2. n. 106.
4 R. 2. n. 33.

especially appear in the Parliament Rolls, where upon a Petition it was desired, *That if it should happen that any Man or Boy should be drowned by a Fall out of any Ship, Boat, or Vessel, they should be no Deodands:* Whereupon the King, by great Advice with his Judges and Council learned in the Laws, made answer, *The Ship, Boat or Vessel, being upon the Sea should be adjudged no Deodand, but being upon a fresh River it should be a Deodand —*

1 H. 5. n. 35.

but the King will shew favour. There are abundance of other Petitions upon the like occasion in Parliament.

A Ship lying at *Rotherbitb*, in the County of *Kent*, near the Shore, to be careened and made clean, it happened that one of the Shipwrights being at work under her at low Water, the Vessel (then leaning aside) fortun'd to turn

turn over the contrary side, by means of which the Shipwright was killed: Upon a Trial at Bar, where the Question was, Whether this *Mich. 29 Ca.* Deodand did belong to the Earl of *Salisbury*, *2. in B. R.* who was Lord of the Manor, lying contiguous to the place where the Man was slain, or to the Almoner, as a matter not granted out of the Crown? In that case it was resolved, That the Ship was a Deodand, and the Jury thereupon found a Verdict for the Lord of *Salisbury*, that the same did belong to his Manor.

I have nothing to add (says that late learned and worthy Judge Sir *Michael Foster*) to what other Writers have said touching Deodands, more than to observe, that as this Forfeiture seemeth to have been originally founded rather in the Superstition of an Age of extreme Ignorance, than in the Principles of sound Reason and true Policy, it hath not of late Years met with great Countenance in *Westminster-Hall*. And when Juries have taken upon them to use a Judgment of Discretion, not strictly within their Province, for reducing the *Quantum* of the Forfeiture, (I wish the Temptation to it was taken out of their way) the Court of *King's Bench* hath refused to interpose in Favour of the Crown or Lord of the Franchise.

It hath frequently interposed its Authority as Sovereign Coroner in this Case, and also in the Case of Suicide, *in favour of the Subject, and to save the Forfeiture*, but will not do it in either Case *to his Prejudice*. And herein it proceedeth upon the same Principle of equitable Justice, that the Courts of *Westminster-Hall* constantly do, in refusing to set aside a wrong Verdict given in *Favour* of the Defendant

dant in a Criminal Case, or in an hard Action, though it is done every Day where a wrong Verdict goeth against him.

In the Case of the King and *Rolfe* Coroner of *Kent*, which came on in *Mich.* and *Hil.* 5 *Geo.* 2. Coroner's Inquest found, that A. B. sitting on his Waggon accidentally fell to the Ground, and that the Horses drawing the Waggon forward, one of the fore Wheels crushed his Head, of which he instantly died, and then concluded that the Wheel, on which they set a small Value, *only* moved to his Death. A Motion was made in behalf of Mr. *Mompesson*, Lord of the Franchise, for quashing this Inquisition, upon Affidavits tending to shew, that the Cart and Horses were equally instrumental; which indeed the finding of the Jury did sufficiently imply. But the Court was very clear, that neither this Court nor the Coroner can oblige the Jury to conclude otherwise than they have done, and would not suffer the Affidavits for quashing the Inquisition to be read. A like Case came on in *Mich.* 29 *Geo.* 2. the King against *Drew*, Coroner of *Middlesex*. The Coroner's Jury upon view of the Body of a Person killed by the like Accident, found that one Wheel of the Waggon *only* moved to the Death. The Court, on Motion in behalf of the Lord of the Franchise, granted a Rule for shewing Cause, why the Inquisition should not be quashed for this Misbehaviour of the Jury. On the Day for shewing Cause, Mr. *Hume Campbell*, Council for the Lord of the Franchise, informed the Court, that upon looking into Precedents, he was satisfied he could not support the Rule, and thereupon it was discharged. The Case of the King and *Rolfe* was

was mentioned on this occasion, and greatly relied on. *Fest. Cr. Law.* 266, 267.

On Importation of prohibited Goods, the *Vide Sid.* 431. Ship cannot be seized as forfeit till a Con-*Mod.* 18. demnation in the Exchequer thereon. *Horne* against *Ivy*, 2 *Keble* 604. 1 *Vent.* 47.

XIV. Thus Men from their necessity and safety having from hollow Trees, nay Reeds, Twigs and Leather (for such were the rude beginnings of those stupendious things we now admire) advanced the Art to that degree, as to render it now the most useful thing extant; and as the Mathematicks, Astronomy and other Sciences have added to its security, so have succeeding Ages, from time to time, provided Privileges and Laws, by which it hath always been regulated and governed, the which upon all Occasions, and in all Courts, have generally had a genuine Construction as near as might be to the Marine-Customs; and therefore at this Day, if a Ship be taken away, or the Owners dispossessed, they may maintain an Action of Trover and Conversion for an eighth or sixteenth part of the same, as well by the Common Laws of this Kingdom, as the Law Marine, and they need not join with the rest of their Owners.

XV. Upon an Information *tam quam*, Ship Naturalized. grounded upon the Act of Navigation, for importing Goods in a Foreign Ship contrary to that Act, The Question was, whether or not, if a Foreign Ship naturalized by the new Act, being a Prize taken in the late War with *Holland*, be afterwards sold to a Foreigner, who sells her again to an *English* Man, whether or no the Oath must be taken again according to the Act? *Per Curiam* it need not, because that

that the Ship was once lawfully naturalized.
Hardres 511. *Martin* against *Verdue*.

Forfeitures
 for delivering
 Goods with-
 out paying
 the Duties.

XVI. Stat. 4th and 5th *Will.* and *Ma. cap.*
 15. §. 14. All Persons who by way of Insur-
 ance, or otherwise, shall undertake to deli-
 ver any Goods imported from beyond Sea,
 without paying the Duties payable for the
 same, or any prohibited Goods, shall for-
 feit 500 *l.*

§. 15.

And all who shall agree to pay any Money,
 for the insuring or conveying any Goods im-
 ported without paying the Duties, or any
 prohibited Goods, or shall receive such pro-
 hibited Goods, or such other Goods before
 the Duties are paid, knowing thereof; shall
 also forfeit for every Offence 500 *l.*

§. 16.

And if the Insurer or Manager of such
 Fraud be the Discoverer, he shall not only
 keep the Insurance Money given him, and
 be discharged of the Penalties to which he
 is liable, but shall have one half of the
 Penalties imposed upon the Parties making
 such Insurance or receiving the Goods as
 aforesaid: And in case no discovery be
 made by the Insurer, and the Party in-
 sured shall make discovery thereof, he shall
 recover back his *Premium*, and have one
 Moiety of the Forfeitures imposed upon the
 Insurer, and be discharged of those imposed
 upon himself.

§. 17.

The said Penalties and Forfeitures to be re-
 coverable according to the Course of the Ex-
 chequer.

§. 18.

Vide Ch. xii.
Sec. ult.

No Penalty to be recoverable, unless pro-
 secuted within 12 Months after the Fact com-
 mitted.

CHAP II.

Masters of Ships, their Action considered in reference to Cases private and publick.

- I. *A Master or Skipper his condition considered, in reference to his Interest and Authority generally. The Master only liable to Deviation and Barretery.*
- II. *If Goods be lost or imbezelled, or any other detriment happens in a Port, who shall answer. Master chargeable to pay the Duty of weighage.*
- III. *The Duty of Masters of Ships, as if they shall set Sail after an Embargo, who shall answer?*
- IV. *Of Faults ascribed to him before departure in tempestuous Weather, staying in Port, &c.*
- V. *Over-charging or over-lading the Ship above the Birth-mark; or receipt of such Persons on Ship-board as may hazard the Lading.*
- VI. *Of Lading aboard in the Ships of Enemies, his own proving disabled.*
- VII. *Of shipping Goods elsewhere than at the publick Ports or Keys, and the taking in prohibited Goods.*
- VIII. *Of wearing unlawful Colours or Flags, and of yielding up his Ship cowardly, if assaulted, where liable, and where excused.*
- IX. *Of carrying fictitious Coquets and Papers, and refusing payment of Customs and Duties.*
- X. *Of setting Sail with insufficient Tackle, and of taking in and delivering out with the like; and of his Charge of Goods till safely delivered.*
- XI. *Of departing without giving notice to the Customer.*
- XII. *Of Faults committed by Master and Skipper at Sea.*
- XIII. *Rules in Law in the charging him for reparation of damage. Infant Master of a Ship sueable in the Admiralty, for wasting or spoiling Goods.*
- XIV. *Of the Power and Authority that the Master hath in disposing, hypothecating or pledging the Ship, Furnitures and Lading.*

- XV. *Where Masters are disabled, though in necessity, to impawn the Vessel.*
 XVI. *Where they may dispose of Vessel and Lading, and where not.*
 XVII. *What Vessels and Mariners the Master must have for importing in or exporting out of His Majesty's Plantations in Asia, Africa, and America.*
 XVIII. *What Ships may go from Port to Port in England.*
 XIX. *Ships not to import the Goods of any Country, but of that from whence they are brought.*
 XX. *What time the Master shall be coming up after arrived at Gravesend, or at any other Port within the Realm, in order to his discharge.*
 XXI. *Of going from Port to Port within the Realm how provided.*
 XXII. *Of Goods prohibited to be imported from the Netherlands or Germany in any Ships whatsoever.*

Leg. 1. de Exercit. AR.
Hob. 11.
Bridgman's Case.
Moor 918.

1. **A** Master of a Ship is more than one, who, for his knowledge in *Navigation*, fidelity and discretion, hath the Government of the Ship committed to his care and management; and by the *Common Law*, (by which Properties are to be guided,) he hath no Property either general or special, by the constituting of him a Master; yet the Law looks upon him as an *Officer*, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction: And therefore if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his Mariners, he must be responsible.

In Chancery.

A Master of a Ship, so appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns to sail from *London* to *Falmouth*, and so from thence to *Barcelona*, without altering the Voyage; and there

there to unlade at a certain Rate *per Tun*. And to perform this the Master obliges the Ship and what was therein, valued at 300*l*. and accordingly a Charter-party was made and sealed between the Master and the Merchant; but the Owners of the Ship were no Parties thereunto. The Master deviates and commits Barretry, and the Merchant in effect loses his Voyage and Goods, for the Merchandize, being Fish, came not till *Lent* was past, and were rotten. The Merchant's Factor thereupon sueth the Master in the Court of Admiralty at *Barcelona*, and upon an Appeal to a higher Court in *Spain*, hath Sentence against the Master and the Ship; which coming to his Hands (*viz.* the Merchant's Hands) the Owner brings an Action of Trover for the Ship; the Master sues in Chancery to stop this Suit, and another Suit brought for the Owner for Freight, claiming deductions out of both, for his Damages sustained by the Master, for the breach of the Articles by the Master, for if the Owner gives Authority to the Master to contract he shall bear the loss, but in Case of Bottomry after a Voyage begun, the Master cannot oblige the Owner beyond the Value of the Ship: But this Case is on Contract.

Lord-Chancellor *Nottingham*. The Charter-Party values the Ship at a certain rate, and you shall not oblige the Owners farther, and that only with relation to the Freight, not to the value of the Ship; the Master is liable to the Deviation and Barretry, but not the Owners; else Masters should be Owners of all mens Ships and Estate, *Mish. 29. Car. 2.*

2 Vern. 643.

But where the Master of the Ship took Beef, Sails, &c. on Credit, and failed, the Owners were obliged to pay; and not allowed to defend themselves by insisting that the Master was liable only, and that they had given him Money to pay the Plaintiff. He is but their Servant, and where he buys they are liable, and continue so if he has not paid the Creditor, though they gave him Money for that Purpose.

Vide 5. Co.
107. Mo. 891,
916.

II. If the fault be committed in any Port, Haven, River, or Creek, or any other place which is *infra Corpus Comitatus*, the Common Law shall have Jurisdiction to answer the party damnified, and not the Admiralty; but if the same be committed *super altum mare*, the Admiralty shall have Jurisdiction of the same; yet if it be on a place where there is *divisum imperium*, then according to the Flux or Reflux the Admiralty may challenge; the other of Common Right belonging to the Common Law.

L. Raymond
272.

The Common Law is the over-ruling Jurisdiction in this Realm; and they are to intitle themselves well who would draw a thing out of it.

And therefore so soon as Merchandizes and other Commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the same be there lost or purloined, or sustain any damage, hurt or loss, whether in the Haven or Port before, or upon the Seas after she is in her Voyage, whether it be by Mariners, or by any other through their permission, he that is *Exercitor Navis* must answer the damage,

F. Naut. canp.
flab. leg. 1.
Sect. 2, 3, 6, 7.

mage, for that the very lading of the Goods aboard the Ship, does subject the Master to answer the same: And with this agrees the *Common Law*, where it was adjudged, That Goods being sent aboard a Ship, and the Master having signed his Bills of Lading for the same, the Goods were stowed, and in the night divers Persons, under the pretence that they were Press-masters, entered the Ship and robbed her of those Goods; the Merchant brought an Action at the *Common Law* against the Master; and the Question was, Whether he should answer for the same; for it was alledged on his part, That there was no default or negligence in him, for he had a sufficient guard, the Goods were all locked up under Hatches, the Thieves came as *Press-Masters*, and by force robbed the Ship; and that the same was *vis major* †, and that he could not have prevented the same. And lastly, That though he was called Master or *Exercitor Navis*, yet he had no share in the Ship, and was but in the Nature of a Servant, acting for a Salary. But notwithstanding it was adjudged for the Plaintiff, for at his peril he must see that all things be forth-coming that are delivered to him, let what accident soever happen; (the act of God, or an Enemy, perils and dangers of the Seas only excepted) but for Fire, Thieves and the like, he must answer, and is in the nature of a
 * *Common Carrier*; and that though he receives a Salary, yet he is a known and publick Officer, and one that the Law looks upon to answer, and the Plaintiff hath his Election to charge either Master or Owners, or both at his pleasure, but can have but one Satisfaction.

† The which the Civil Law does sometimes allow.

• *Reg.* 105.
F.N.B. 104.b.
Inst. 89.
Co. 84. a.
Mo. 876.
Hob. 17. 18.
Poph. 178.
179.
Cro. Jac. 188,
 189. 330. 331.
 If *Salk.* 388.

1 Sld. 36. *Debet Exercitor omnium nautarum suorum, siue liberi sint siue servi, factum prestare, nec immerito factum eorum prestat, cum ipse eos suo periculo adhibuerit: Sed non alias prestat quam si in ipsa nave damnum datum sit, ceterum si extra navem, licet à nautis, non prestat.*
Naut. Caup. Stabilit. Leg. 1. Sect. 7. debet Exercitor.

Eod. Leg. debet Exercitor.

If a Master shall receive Goods at the Wharf or Key, or shall send his Boat for the same, and they happen to be lost, he shall likewise answer both by the Marine Law and the Common Law.

Mayor & Com. de London against Hunt.

Error of a Judgment in B. R. in *Assumpsit* brought by the Mayor and Commonalty against *Hunt*, where they declared of a Custom, That they and their Predecessors, Majors, &c. had of every Master of a Ship 8 s. per Tun for every Tun of Cheese brought from any place in *England* to the Port of *London*, *ab oriente de London-Bridge*, in the name of Weighage; and that the Defendant being Master of a Ship, had brought to the Port of *London* so many Tuns, which at that rate came to so much, which he hath not paid; upon *non Assumpsit*, Verdict and Judgment for the Plaintiff. Upon which *Hunt* the Defendant brought a Writ of Error, and two Errors were assigned. 1. That the Action did not lie against the Master, but that the Duty was due from the Merchants, Owners of the Goods; but the Judgment was affirmed, for that the Master is intrusted with the Goods, and hath a Recompence from the Merchants for bringing the Goods, and is responsible for them, and therefore shall be charged for the Duty; and it would be infinite to search for the Owners of the several Goods, which are all in the Custody of the Master

Master who brought them into Port, and therefore he shall be charged. 3. *Levinz* 37.

III. If Goods be laden aboard, and after *Digest. lib. 9. tit. 2. Leg. 61.* an Embargo or Restraint from the Prince or State comes forth, and then he breaks Ground, or endeavours to sail away, if any damage accrues, he must be responsible for the same. The reason is, because his Freight is due and must be paid; nay, although the very Goods be seized as *bona contrabandos*.

A Ship was hired to J. S. in England to *2 Vern. 242.* freight at 3*l.* 10*s.* per Tun to Bourdeaux; then an Embargo is laid; she afterwards proceeds to Bourdeaux; the Master, not discovering his first Agreement, agrees with the Correspondents there of J. S. to allow him 6*l.* 10*s.* per Tun; upon this last Agreement he recovered at Law; and Equiry would not relieve; because the Performance of the first Agreement was hindered by the Embargo.

IV. He must not sail in tempestuous Weather, nor put forth to Sea without having first consulted with his Company*; nor must he stay in Port or Harbour without just cause *• Leg. Oleron. Judg. 2.* when a fair wind invites his departure.

V. He must not over-charge or lade his Ship above the Birth-mark, or take into his Ship any Person of an obscure and unknown Condition, without Letters of safe Conduct. *Stat. 18 H. 6. cap. 8.*

VI. Nor ought he to lade any of his Merchant's Goods aboard any of the King's Enemies Ships (admitting his own Vessel leaky or disabled) without Letters of safe Conduct; otherwise the same may be made Prize, and he must answer the Damage that follows the Action. *Lib. ult. ad Leg. Rhod. 3. Leg. quum proponas C. de Naut. fenerator. Stat. 4 H. 4. 20.*

Nor shall he come or sneak into the Creeks or other places, when laden homewards, but *Stat. 15 H. 6. cap. 8.* into.

into the King's great Ports, (unless he be driven in by Tempest) for otherwise he forfeits to the King all the Merchandize, and therefore must answer.

1 *El. c. 11. §.*

2.

13, 14 *C. 2.*

c. 11. §. 14.

19 *El. cap. 9.*

1, 2 *P. & M. 5.*

1 *Jac. cap. 25.*

12 *Car. 2. cap.*

18.

VII. Nor ought he to ship any Merchandizes, but only at the *Publick Ports* and *Keys*.

He must not lade any prohibited or unlawful Goods, whereby the whole *Cargo* may be in danger of Confiscation, or at least subject to seizure or surreption.

He may not set sail without able and sufficient Mariners both for quality and number.

By 5 *G. 2. ch. 20.* Masters of Vessels outward-bound are not to receive on board their Gunpounder, either as Merchandize or Ammunition (the King's Service excepted) before they be at, over-against, or below *Black-Wall*, on forfeiture of 5*l.* for every 50 *lb.* Weight, &c.

By the same Act, the Masters of Ships coming into the *Thames* shall land their Powder before their Arrival at *Black-Wall*; or within twenty-four Hours, if Weather permit, after they come to anchor there, or at the Place of unloading; forfeiture as in foregoing Section.

Keeping Guns shotted, firing a Gun above *Blackwall* before Sun-rising or after Sun-setting, are also prohibited by the same Act, but under smaller Penalties, viz. A Gun shotted 5*s.* a Gun fired 10*s.* melting Pitch there on board is liable to a Penalty of 5*l.*

Search may be made by an Elder-Brother of *Trinity-House*, impowered under the Corporation Seal; and not permitting him to make due search is liable to a Penalty of 5*l.*

VIII. He may not use any unlawful Colours, Ensigns, Pendants, Jacks or *Flags* *, * Proclamation Sept. 25. An. 26 Car. 2. Per Leg. quum proponas ad Leg. Rhod. D. Leg. in fin. & Leg. si vendita peric. rei vend. & Leg. 5 & 6. Naut. Camp. 1 Ven. 190, 238. Raymond 120. 1 Mod. 85. 2 Levins. 69.

He must not suffer the Lading to be stolen or imbezzled; if the same be, he must be responsible, unless it be where there is *vis major*; as if he be assaulted at Sea either by Enemies, Ships of Reprize, or Pirates, there, if no fault or negligence was in him, but that he performed the part of an honest, faithful, and valiant man, he shall be excused. Yet it hath been adjudged, That if a Merchantman lies in a Port or Haven, and a Pirate, Sea-Rover, or other Thieves enter her and over-power her Men, and then rob her, yet the Master must be responsible; but if an Enemy enter and commit the depredation, there the Master is excused. 2 Keble 866, 3 Keb. 72, 112, 132, 135.

IX. He must not carry any counterfeit Coquets or other fictitious and colourable Ship-papers to involve the Goods of the Innocent with the Nocent. 13 R. 2. cap. 9. Leg. 1. Cod. de Navib. non excusand.

Nor must he refuse the payment of the just and ordinary Duties and Port-charges, Customs and Imports, to the hazard of any part of his Lading; yet if he offers that which is just and pertains to pay, then he is excused. Secund. fin. Leg. ult. ad Leg. quum proponas C. d. Naut. fænor. Leg. Oleron. 24. Per. Leg. quant. de pub.

X. He must not set sail with insufficient Rigging or Tackle, or with other or fewer Cables than is usual and requisite, respect being had to the burden of the Vessel: And if any damage happens by the delivery of the Goods into the Lighter, as that the Ropes break, and the like; there he must answer; but

but if the Lighter comes to the Wharf or Key; and then in taking up the Goods, the Rope breaks, the Master is excused, and the Wharfinger is liable.

If fine Goods, or the like, are put into a close Lighter, and to be conveyed from the Ship to the Key, it is usual there, that the Master send a competent number of his Mariners to look to the Merchandize, if then any of the Goods are lost and imbezzled, the Master is responsible *, and not the Wharfinger; but if such Goods are to be sent aboard a Ship, there the Wharfinger, at his Peril, must take care the same be preserved.

* *Pascb. 26.*
Car. rul'd at
Guild-Hall by
L. C. J. Hale.

XI. After his Arrival at Port, he ought to see that the Ship be well moored and anchored; and after reladed, not to depart or set sail till he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his Mariners, whereby the Merchant or the Lading receives any damage, he must answer the same.

18 *Eliz. cap. 9.*
14 *Car. 2.*
cap. 11.

XII. And as the Law ascribes these things and many more to him as faults, when committed by him or his Mariners in Ports, so there are other things which the Law looks upon to be as faults in him in his Voyage, when done:

As if he deviates in his course without just cause, or steers a dangerous and unusual way, when he may have a more secure passage; though to avoid illegal impositions, he may somewhat change his course; nor may he sail by places infested with Pirates, Enemies, or other places notoriously known to be unsafe; nor engage his Vessel among Rocks or remarkable Sands, being there to necessitated by violence

Digest. l. cum
in debito F. de
Probat.

Lib. 1. Cod. de
Nauibus non
excusand.

violence of Wind and Weather, or deluded by false Lights.

The Master shall not be answerable for the Contracts of their Mariners; but they may be detained for their Crimes.

XIII. By the Marine Law, he that will charge a Master with a fault, as in relation to his Duty, must not think that a general charge is sufficient in Law, but he ought to assign and specify the very fault wherewith he is to be charged.

So he that will infer, that such or such a sad disaster hath happened or been occasioned by reason of some fault in the Mariners; must not only prove the fault itself, but must also prove that that fault did dispose to such a sad event; or that such a misfortune could not have happened without such a fault precedent.

If an Infant being Master of a Ship, by Contract with another, take upon him to bring certain Goods from *St. Christophers* to *England*, and there to deliver them, but delivers them not according to agreement, but wastes and consumes them, he may be sued in the Admiral Court altho' he be an Infant; for this Suit is but in Nature of a Detinue or a Trover and Conversion at the Common Law; and a Prohibition denied for that Cause. *Furnes against Smith. 1 Rolls Abr. 530.*

Infant Master of a Ship, liable to be sued in the Admiralty.

XIV. When Voyages are undertaken, the Master is there placed in by the Owners, and they ought to make good the Master's fact and deed; † and therefore as the whole care and charge of Ship and Goods are committed to the Master, it is the prudence of the Owners to be careful who they will admit Commander of their Ship, since their actions sub-

† *Receptum sal-
vum fore, u-
trum si in na-
vim res missæ
ei assignatæ
sint, an et si non
sint ei assignatæ.*

ject

*de, hoc tamen
ipso quod in na-
vim missæ sint,
receptæ viden-
tur, & omni-
um recepit cu-
stodiam quæ in
navim illatæ
sunt, & fact-
um non solum
nautarum præ-
stare debet, sed
& rectorum.
F. Nautæ
Caup. Stab.
Leg. 1. Sect.
recepit.*

ject them to answer the damage, or whatever other Act he shall do in reference to this Im-
ploy; and therefore he can freight out the
Vessel, take in Goods and Passengers, mend
and furnish the Ship; and to that effect, if
need be, in a strange Country he may bor-
row Money, with Advice of his Mariners,
upon some of the Tackle, or sell some of the
Merchandize. If part of the Goods shall be
sold in such necessity, the highest price that
the remainder are sold for, must be answered
and paid to the Merchant; after which the
Merchant must pay for the Freight of those
Goods as well as for the remainder, *Leg. Ole-
ron. 1.* But if the Ship in the Voyage happens
to be cast away, then only shall be tendered
the price that the Goods were bought for.

By the *Common Law*, the Master of a Ship
could not impawn the Ship or Goods, for
any Property either general or special was not
in him, nor is such power given unto him by
the constituting of him a Master.

*Leg. Oleron.
c. 22.
Hob. 11, 12.
Litch 252.
Noy. 95.
Mo. 918.
Leg. Oleron.
c. 1, 12.
Salk. 34. pl. 7.*

Yet the *Common Law* hath held the Law
of *Oleron* reasonable, That if a Ship be at
Sea and takes leak, or otherwise want Victuals
or other Necessaries, whereby either herself
be in danger, or the Voyage may be defeated,
that in such case of necessity the Master may
impawn for money or other things, to relieve
such extremities, by employing the same to
that end; and therefore he being the Person
trusted with the Ship and Voyage, may there-
fore reasonably be thought to have that power
given to him implicitly, rather than to see
the whole lost.

*Lex Mercator
102, 122.*

A Ship put into *Boston* in *New-England*,
and there the Master took up Necessaries,
and gave a Bill of Sale by way of Hypothe-
cation,

cation, and there being a Suit against the Ship and Owners to compel Repayment, a Prohibition was prayed; whereupon the Court held, that the Master could not by his contract make the Owners personally liable to a Suit, and therefore granted a Prohibition as to them, but refused it as to the Ship; for the Master can have no credit but upon giving security by Hypothecation: And that it was unreasonable for them to prevent the Court of Admiralty's giving a Remedy, when they could give none themselves.

But a Master, for any debt of his own, cannot impawn or hypothecate the Ship, &c. for the same is no ways liable, but in case of necessity for the relief and compleating of the Voyage.

Nor can he sell or dispose of the same without an Authority or Licence from the Owners; and when he does impawn or hypothecate the Vessel or Furniture, he ought to have the consent and advice of his Mariners.

A Ship being repaired, &c. in the *Thames*, is not liable, but the Owners.

XV. And where the Ship is well engaged, she is for ever obliged, and the Owners are concluded thereby till Redemption.

But in regard Masters might not be tempted to engage the Owners, or infetter them with such sort of obligations, but where there is very apparent cause and necessity, they seldom suffer, any to go Skipper or Master, but he that hath a share or part in her; so that if Monies or Provisions be taken up, he must bear his equal share and proportion with the rest.

Not

Judgment, Oleron, cap. 22.

Nor can the Master on every case of necessity impawn the Vessel or Furniture; for if she be freighted, and he and the Owners are to join in the laying in of the Provisions for the Voyage, and perhaps he wants money, (a great sign of Necessity) yet can he not impawn the Vessel or Furniture, any other or further than for his own part or share in her, the which he may transfer and grant, as a Man may do an eighth or fifth part in Lands or Houses: But such obligation of the Vessel must be in Foreign parts, or Places where the Calamity or Necessity is universal on the Vessel, that will oblige all the Owners.

L. Raymond 577. 578.

Where a Ship was hypothecated at *Amsterdam*, the Party was allowed to sue in the Admiralty here.

Judgment, Oleron, cap. 3.

XVI. If the Vessel happens afterwards to be wrecked or cast away, and the Mariners by their great Pains and Care recover some of the Ruins and Lading, the Master in that Case may pledge the same, the Product of which he may distribute amongst his distressed Mariners, in order to the carrying them home to their own Country: But if the Mariners no way contributed to the Salvage, then their Reward is sunk and lost with the Vessel. And if there be any considerable part of the Lading preserved, he ought not to dismiss the Mariners, till Advice from the Laders or Freighters; for otherwise perchance he may be made liable.

Leg. Oleron. cap. 22.

If Merchants freight a Vessel at their own Charges, and set her to Sea, and she happens afterwards to be Weather-bound, the Master may impawn either the Ship or Lading at his Pleasure, or at least such as he could conveniently raise Monies on, rather than see the whole

whole Voyage lost. And if he cannot pawn the Lading, he may sell the same, that is, so much as is necessary; in all which Cases his Act obliges.

However, Orders and Instructions are as carefully to be looked upon and followed as the Magnet.

XVII. He is not to import into, or export out of any the *English* Plantations in *Asia*, *Africa*, or *America*, but in *English* or *Irish* Vessels, or of the Vessels built and belonging to that Country, Island, Plantation, or Territory; the Master and three-fourths of the Mariners to be *English*, upon forfeiture of Ship and Goods; and if otherwise, they are to be looked upon as Prize, and may be seized by any of the King's Officers and Commanders, and to be divided as Prizes, according to the Orders and Rules of the Sea.

All Goods of the Growth of his Majesty's Plantations are not to be imported into *England*, *Ireland*, or *Wales*, Island of *Jersey* or *Guernsey*, but in such Vessels as truly belong to Owners that are of *England*, *Ireland*, *Wales*, *Jersey* or *Guernsey*, and three-fourths at least of the Mariners are to be *English*, upon forfeiture of Ship and Goods.

The Goods and Wares of those Plantations, and brought in such manner as aforesaid, must be brought from those very Countries of their several Productions and Growths, or from the Ports where they are usually shipped out, on forfeiture of Ships and Goods.

XVIII. No Ship to go from Port to Port in *England*, *Ireland*, *Wales*, *Jersey*, or *Guernsey*, or *Berwick*, unless the Owners are Denizens or Naturalized, and the Master and three-fourths to be *English*.

The like provision on the like penalty is for Goods of *Muscovy*, and of the Dominions and Territories of the *Czar*: So likewise of Currants belonging to the *Ottoman* Territories or Dominions.

Note, Cases of sickness, death, captivity, save the Clause as to Mariners.

That is those that do not belong to *English*, *Irish*, *Welsh*, or those of *Jersey*, or *Guernsey*.

All *sey*.

All Owners must swear that their Vessels or Ships are their own proper Ships and Vessels, and that no Foreigner hath any Share or Part in her, and must enter the same; and that she was bought for a valuable Consideration, *Bona fide*.

XIX. Nor to bring in any Goods from any Place, but what are of the Growth of that very Country, or those Places which usually are for the first shipping, on pain of forfeiture of their Vessel and Furniture.

This doth not extend so far, but that Masters may take in Goods in any part of the *Levant* or *Streights*, although they are not of the very Growth of the Place, so that they be imported in *English* Ships, three-fourths *English* Mariners: So likewise those Ships that are for *India* in any of those Seas to the Southward and Eastward of the *Cape of Good-Hope*, although the Ports are not the Places of their very Growth.

12 Car. 2.
cap. 18.

Any People of *England* may import (the Master and Mariners three-fourths *English*) any Goods or Wares from *Spain*, *Portugal*, *Azores*, *Madeira*, or *Canary* Islands; nay in Ships that are not *English* built, Bullion may be imported; so likewise in those that are taken by way of Prize, *Bona fide*.

But Sugars, Tobacco, Cottons, Ginger, Indicoes, Fustick, or any other dying Wood of the Growth of his Majesty's Plantations, to be shipped, carried or conveyed from any of the *English* Plantations, are to be carried to no Place in the World, but are to come directly for *England*, *Ireland*, *Wales*, or *Berwick*, upon pain of forfeiture of Ship and Goods; and the Master is to give Bond with one Security in 1000 *l.* if the Ship be under the bur-

den

den of 100 Tuns, and 2000 *l.* if above; that upon Lading he brings his Ship directly into *England, Ireland, Wales* or *Berwick*, (the danger of the Seas excepted) so likewise they are to do the same for the Ships that shall go from the Plantations, to the Governor of such Plantation, upon forfeiture of the Ship and Goods.

By 3 *Geo. 2. c. 28.* Rice is permitted to be carried South of *Cape Fineserre* without first coming to *Great-Britain*.

XX. When the Master shall arrive at *Gravesend*, he shall not be above three Days coming from thence to the Place of Discharge; nor is he to touch at any Key or Wharf till he comes to *Chester's Key*, unless hindered by contrary Winds, or Draught of Water, or other just Impediment to be allowed by the Officers: And likewise he or his Purser are there to make Oath of the Burden, Contents and Lading of his Ship, and of the Marks, Number, Contents, and Qualities of every Parcel of Goods therein laden, to the best of his Knowledge; also where and in what Port she took in her Lading, and what Country built, and how manned, who was Master during the Voyage, and who the Owners; and in Out-Ports must come up to the Place of unlading, as the condition of the Port requires, and make Entries, on pain of 100 *l.*

Nor is such a Master to lade aboard any Goods outwards to any Place whatsoever, without entering the Ship at the Custom-House, her Captain, Master, Burden, Guns, Ammunition, and to what Place she intends, and before Departure to bring in a Note under his Hand of every Merchant that shall

have laid aboard any Goods, together with the Marks and Numbers of such Goods, and be sworn as to the same, on pain of 100 l.

No Captain, Master, Purser of any of His Majesty's Ships of War, shall unlade any Goods before Entry made, on pain of 100 l.

Note, There is a List of all Foreign built Ships in the Exchequer. No Foreign Ship, not built in any of His Majesty's Dominions of *Asia*, *Africa*, or *America*, after *Octob.* 1, 1662, and expressly named in the List, shall enjoy the Privileges of a Ship belonging to *England* or *Ireland*, although owned and manned by *English*, except only such as are taken by way of Reprize, and Condemnation made in the Admiralty as lawful Prize. None but *English* and *Irish* Subjects in the Plantations are to be accounted *English*.

XXI. If the Master shall have Freight from Port to Port within the Realm, he ought to have Warrant for the same, on pain of Forfeiture of the Goods; and he is to take forth a Cocquet, and become bound to go to such Port designed for, and to return a Certificate from the chief Officers of that Port where the same is designed for, and discharged within six Months from the date of the Cocquet.

XXII. But from the *Netherlands* or *Germany*, there may not be imported any sort of Wines (other than *Rhenish*) Spicery, Grocery, Tobacco, Pot-ashes, Pitch, Tar, Salt, Rosin, Deal-boards, hard Timber, Oil, or Olives, in any manner of Ships whatsoever.

It might not seem impertinent, that this latter Part which is abridged, in reference to Matters publick, should be inserted; for that sometimes it may happen, that an honest and well meaning Master or Skipper might innocently

cently involve and hazard the Loss of his Ship, by committing Acts against Laws positive and prohibitory; and though Masters and Mariners, *qua tales*, be not so exquisite, as to know all that does belong to their Duties, or at least that which the Law lays incumbent on their Shoulders; yet for that most of them have some small glimmerings of the same, such Hints in Matters publick as well as private, may not only be of some Advantage to them, but also to Merchants, who always, upon the Miscarriages of the Masters, prove the greatest Sufferers; the Offenders, for the most part, proving not sufficiently solvent.

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C H A P. III.

Of Mariners, their several Offices and Immunities, and of Barretry committed by them.

- I. *The several Marine Officers on Ship-board, and their Charges and Duties.*
- II. *Of the Master's Power and Authority over them, as in relation to punishing or otherwise.*
- III. *The Duty that Mariners owe to each other, and they to the Ship.*
- IV. *Their attendance requisite when laden; and if detriment, where to be responsible.*
- V. *When Accidents befall them, where they ought to be looked after, and at whose costs.*
- VI. *The Mariners Oath where requisite to the discharging of the Master.*
- VII. *What Accidents do destroy, and what not, their Wages.*
- VIII. *Where they may join all in a Suit for the recovery of their Wages, and where not.*
- IX. *Of their Wages where liable to answer damage.*
- X. *Where they absolutely lose their Wages.*
- XI. *Of Money or Goods taken up by a Mariner, where it shall be debt, and where a Discount of his Wages.*
- XII. *And of their becoming liable to Correction.*
- XIII. *Barretry in the Mariners, the reason why the Law imputes Offences in them to be answered by the Master.*
- XIV. *In what Cases the Master shall become liable for the Actions of his Mariners.*
- XV. *Of Goods purloined before they are brought on Ship-board, where the Master is bound to answer, and where not.*
- XVI. *Of the Antiquity of such Custom.*
- XVII. *Of Goods brought secretly in on Ship-board, if purloined, where the Master is not made liable.*
- XVIII. *Of*

XVIII. *Of Caution or fore-warning where the same shall excuse the Master.*

XIX. *Where the Master shall be liable, notwithstanding such Caution.*

I. **T**HE Persons ordinary for sailing in Ships have divers Denominations: The first, which is the Master, known to us and by most Nations both now and of old, and especially by the *Roman Laws*, *Navicularius* or *Magister Navis*; in *English* rendered Master; or *Exercitor Navis*; in the *Teutonick* Skipper; by the *Grecians*, *Navarchus* or *Nautarchus*; by the *Italians*, *Patrono*. But this is only to those Vessels that are Ships of Burden and of Carriage; for to Ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Master, is he who directs the Ship in the Course of her Voyage, by the *French* called *Pilote*; by the *English* and *Fleming*, *Steersman*; by the *Romans*, *Gubernator*; by the *Italians*, *Nocbiero Pilotto* and *Navarchus*, as *Gerettus* writes. The third is esteemed the Master's Mate or Companion, chiefly if the Master be Steersman himself; of old by the *Grecians* and *Romans* called *Proreta*; his Charge is to command all before the Mast. Leg. 1. & passim ad Leg. Rhod. & lib. 1. parag. 2. Naut. Caup. Vid. Leg. Com. sol.

His Successor in order is the Carpenter or Shipwright, by those two Nations of old called *Naupegus* by the latter; by the first *Calaphates*. From the Loins of one of that Rank sprang that great Emperor *Michael*, surnamed *Calaphates*, who denied not to own the Quality of his Father among his Regal Titles. The Father was of *Phalagonia*, as *Egnatius Volateranus* observes, *lib. 23.* The very Name of *Calaphate* the *Venetian* and *Italian* still use to this Day.

The next who succeeds in order, is he who bears the Charge of the Ship's Boat, by the *Italians*

Italians called *Brachierie*; by the *Gracians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

III Consolato
Stat. 14 Car.
2. cap. 11.

The sixth in order, especially in Ships of Burden, is the Clerk or *Purser*, by the *Italians* called *Scrivano*; whose Duty is the registering and keeping the Accounts of all received in or delivered out of the Ship; for all other Goods that are not by him entered or taken into Charge, if they happen to be cast overboard in a Storm, or are stolen or imbezzled, the Master answers them not, there being no Obligation on him by Law for the same; his Duty is to unlade by Day, not Night.

The seventh a most necessary Officer, as long as there are aboard Bellies, sharp Stomachs and Provision, called the *Cook*.

Budæus ad
Leg. 1. Naut.
Caup. 101.

The eighth is the Ship's Boy, who keeps her continually in Harbours, called of old by the *Gracians*, *Nauphilakes*; by the *Italians*, *Guardino*: These Persons are distinct in Offices and Names, and are likewise distinguished in their Hires and Wages; the rest of the Crew are under the common Name of Mariners, by the *Romans* called *Nautæ*; but the *Tarpollians*, or those Youths or Boys that are Apprentices, obliged to the most servile Duties in the Ship, were of old called *Mesonautæ*.

Masters of
Ships, &c.
obliged to
take Ap-
prentices.

By Stat. 2 and 3 *Ann. c. 6. Sect. 8* "Every Master or Owner of a Ship from thirty to forty Tons burden, shall be (1) obliged to take one Apprentice, and one more for the next

(1) By Stat. 4 *Ann. c. 19. Sect. 16*. "No Master shall be obliged to take any such Apprentice under thirteen Years of Age, or who shall not appear to be fully qualified, both as to Health and Strength of Body for that Service."

fifty Ton, and one more for every hundred Ton Ship shall exceed the Burden of an hundred Ton; on pain of forfeiting 10 *l.* to the Poor of the Parish from whence such Boy was bound."

By *Sett.* 1. "It shall be lawful for two Justices, and for the head Officers in Corporations, and for the Church-wardens and Overseers of the several Parishes or Townships, with the Consent of such Justices or head Officers, to bind and put out any Boy of the Age of ten Years or upwards, or who shall be chargeable, or who shall beg for Alms, to be an Apprentice to the Sea Service, to any Subject, being Master or Owner of any Ship or Vessel, until he shall attain the Age of twenty-one Years.

The Boy's Age shall be inserted in the Indenture, being truly taken from a Copy of the Entry in the Register Book (where it can be had) which Copy shall be given and attested without Fee: And where no such Entry can be found, two Justices, and such head Officers, shall, as fully as they can inform themselves of such Boy's Age, and from such Information insert the same in the Indentures. *id.*

By *Sett.* 2. "And the Church-wardens and Overseers shall pay down to the Master, at the Time of the Binding, the Sum of fifty Shillings for Cloathing and Bedding; and the Charges by this Act appointed, shall be allowed on their Accompts."

By *Sett.* 5. "The Church-wardens and Overseers shall send the Indentures to the Collector of the Customs at the Port whereunto the Master belongeth, who shall enter the Indenture in a Book, and make an Indorsement

Parish Boys may be put out Apprentices for the Sea Service to Masters Ships, &c.

Boy's Age to be inserted in the Indenture.

Church-wardens to pay down 50*l.* for Boy's necessary Cloathing, &c. and be allowed the same in Accompt.

Apprentice's Indentures to be sent to the Collector at the Port whereunto

his Master belongs: Collector to enter same gratis.

upon the Indenture of the Registry thereof, subscribed by him without Fee; and if he shall neglect or refuse to enter such Indentures, and indorse the same, or make false Entries, he shall forfeit five Pounds to the Poor of the Parish from whence such Boy was bound."

Inrolment.

The Indentures of Persons binding themselves Apprentices to Mariners, are to be inrolled in the next Corporate Town. 3 *Lev. Rep.* 389. 5 *Eliz. c.* 4. *Seet.* 29.

How Apprentices shall be conveyed to the Port to which their Masters belong.

By *Seet.* 10. "Such Apprentice shall be conveyed to the Port to which his Master belongeth, by the Church-wardens and Overseers, or their Agents; and the Charges thereof shall be (1) paid as by the Vagrant Act 11 and 12 *W. 3. c.* 19.

The Counterparts of their Indentures to be transmitted to the Church-wardens, &c.

By *Seet.* 11. "The Counterpart of the Indenture shall be sealed and executed by the Master, and attested by the Collector of the Port, and the Constable or other Officer who carries the Apprentice; which Officer shall transmit such Counterpart to the Church-wardens and Overseers of the Place from whence the Apprentice was bound."

Parish Boys bound Apprentices may be turned over to the Sea Service.

By *Seet.* 6. "Every Person to whom any poor Parish Boy shall be put Apprentice by the 43 *Eliz.* may with the Consent of two Justices dwelling near the Parish where such poor Boy was bound, or with the like Consent of the chief Officer in a Corporation, at the Request of the Master, his Executors, Administrators or Assigns, by Indenture assign over such poor Boy Apprentice to any

(1) That is to say, out of the Goal and Marshalsea Money; which, by 12 *Geo. 2. c.* 19. is directed to be paid out of the General County Rate. *Burn.* 65.

Master

Master or Owner of a Ship or Vessel, using the Sea Service, during the remaining Time of his Apprenticeship."

By 4 *An. c. 19. Sect. 16.* "If the Master Master dying, shall die during the Term, his Widow, or his Executor or Administrator may assign over such Apprentice to any other Master who hath not his Complement of Apprentices."

By 2 and 3 *An. c. 6. Sect. 5.* "The Col- Lord Admi-
lector or his Deputy shall transmit a Certifi- ral to grant
cate under his hand to the Commissioners of Protections
the Admiralty, containing the Name and from being
Age of such Apprentice, and to what Ship impressed till
he belongs; and on Receipt of such Certifi- 18, *gratis*.
cate, a Protection shall be made and given
gratis to such Apprentice, till he attain the
age of eighteen Years."

By *Sect. 15.* "Every Person who shall Persons vo-
voluntarily bind himself Apprentice to the luntarily
Sea Service, shall not be impressed for three binding
Years from the Date of his Indentures; which themselves
Indentures shall be registered, and Certificates Apprentices
thereof given and transmitted by the Collec- to the Sea
tor as aforesaid; on Receipt of which Cer- Service, not
tificate, Protections shall be made and given to be impres-
for the first three Years without Fee." sed for three
Years. In-
dentures to
be registered, and Protections given for said three Years.

By 4 *An. c. 19. Sect. 17.* "No Person of No Appren-
the Age of 18 Years shall have any Protec- tice to the
tion from being impressed, who shall have Sea Service of
been in any Sea Service, before he be und 18 Years old
himself Apprentice." exempt
from the

Queen's Service at Sea.

By 13 *Geo. 2. c. 17. Sect. 3.* "Every Per- Lord High-
son not having before used the Sea, who shall Admiral, &c.
bind himself Apprentice to serve at Sea, to grant Pro-
shall be exempted from being impressed for tections to
Persons ex-
three empted from

being impressed without Fee.

three Years, and the Commissioners of the Admiralty on due proof of the Circumstances, shall grant (1) Protection accordingly without Fee."

When impressed, the Master to have the Wages of able Seamen for them.

By 2 and 3 *An. c. 6. Sect. 17.* "When such voluntary Apprentice shall be impressed or voluntarily enter into the King's Service, the Owner or Master, his Executors, Administrators or Assigns, shall be intitled to able Seamens Wages, for such of the Apprentices, as shall upon due Examination be found qualified for the same, notwithstanding (2) their Indentures of Apprenticeship."

Exempted from the 6 d. a Month to *Greenwich Hospital*, until 18 Years old.

By *Sect. 7.* "Such poor Boys bound out, or assigned over, to the Sea Service, until they shall attain to the age of 18 Years, shall be exempted from the Payment of 6 d. a Month to *Greenwich Hospital.*"

Master to enter his Apprentices on clearing out.

By *Sect. 9.* "Every Master so obliged to take such Apprentice, shall after his arrival into any Port aforesaid, and before he clears out of such Port, give an account in writing under his hand, to the Collector, containing the Names and number of such Apprentices as are then remaining in his Service."

Officer to insert on the Cocquet the Number of Men and Boys on board.

By *Sect. 14.* "Every Custom-house Officer shall insert at the bottom of their Cocquets, the Number of Men and Boys on board their respective Ships at their going out, describing the Apprentices by their Names, Ages, and Dates of their Indentures, for which no Fee shall be taken."

(1) *Note*, by 2 G. 3. c. 15. *Sect. 22, 23, 24, 25.* "Masters, Apprentices, Mariners and others employed in fishing Vessels upon the Coasts, are exempted, during such their Employment, from being impressed."

(2) Is it not the Indenture of Apprenticeship, and that only, which gives the Master a Right to the Wages of his Apprentice?

By

By *Stat. 13.* "The Collector in the Port shall keep a Register, containing the number and burden of all Ships belonging to the Port, together with the Masters or Owners Names, and also the Names of all such Apprentices in such Ship, and from what Parishes and Places they were sent, and shall transmit (*gratis*) true Copies thereof signed by him, to the quarter Sessions, or to such Towns Corporate, Parishes, or Places, when and so often as he shall be reasonably required so to do; and every Collector refusing or neglecting to send such Copy, shall forfeit five Pounds to the Poor of the Parish from whence such Boy was bound."

Registry to be kept in the Ports by the Collector, and transmit a Copy thereof to the Quarter Sessions, &c. gratis.

By *Stat. 12.* "Two Justices near the Port, and Mayors of Towns Corporate, in or near adjoining to such Port, to which such Ship or Vessel shall at any time arrive, may determine all Complaints of ill usage from the Master to such Apprentice, and also of all such as shall voluntarily put themselves Apprentices to the Sea Service, and make such order therein as they are now enabled by Law to do, in other Cases between Masters and Apprentices."

Justices to determine Differences between Masters and Apprentices.

By *Stat. 18.* "All the Penalties aforesaid shall, by Warrant of two Justices of the County, City, or Town Corporate, be levied by Distress and Sale."

Penalties and Forfeitures how to be levied.

By *Stat. 2 Geo. 2. c. 36. Sect. 1.* "It shall not be lawful for any Master of a Ship bound beyond the Seas, to carry any Mariner, except his Apprentices, from the Port where he was shipt, to proceed on any Voyage beyond the Seas, without first coming to an Agreement with such Mariners for their Wages,"

No Masters of Ships to proceed on a Voyage without agreeing with the Mariners for Wages in Writing.

Apprentices
excepted.

On Forfeit-
ure of 5 l. for
each Mariner.

Seamen to
sign Agree-
ments, which
are to be con-
clusive.

Wages for-
feited by De-
sertion.

Justices may
commit De-
serters to
House of
Correction

Wages, which Agreement shall be made in writing, declaring what Wages each Seaman is to have for so long Time as they shall ship themselves for, and also to express in the Agreement the Voyage for which such Seaman was shipped; and if any such Master shall carry out any Mariner, except his Apprentice, upon any Voyage beyond the Seas, without first entering into such Agreement, and he and they signing the same, he shall forfeit 5 l. for every such Mariner, to the use of *Greenwich Hospital*, to be recovered on Information on the Oath of one Witness, before one Justice of Peace, who is required to issue his Warrant to bring before him such Master; and in case he refuses to pay the Forfeiture, to grant his Warrant to levy by Distress and Sale of Goods; and if no Distress can be found, to commit him to the common Goal till he pay the same."

By *Secl. 2.* "If any Seaman Ship himself on board any Merchant Vessel on an intended Voyage for Parts beyond the Seas, he shall be obliged to sign such Agreement within three Days after he shall have entered himself, which Agreement shall be conclusive to all Parties for the Time contracted for."

By *Secl. 3.* "If any Seaman shall desert, or refuse to proceed on the Voyage, or shall desert in Parts beyond the Seas, after he shall have signed such Contract, he shall forfeit to the Owners of the Ship, the Wages due to him at the Time of his Deserting, or refusing to proceed on the Voyage."

By *Secl. 4.* "If any Seaman shall desert, or absent himself from the Ship, after he hath signed a Contract, upon Application made to any Justice of Peace by the Master or other Person having charge of the Ship, it shall be

be lawful for such Justice to issue his Warrant to apprehend such Seaman; and, if he shall refuse to proceed on the Voyage, and shall not give a sufficient reason for such refusal, to the satisfaction of the Justice, to commit him to the House of Correction, to be kept to hard Labour, not exceeding 30 Days, nor less than 14."

By *Secl. 5.* "If any Seaman shall absent himself from the Vessel to which he belongs, without leave of the Master or other chief Officer having charge of such Ship, he shall for every Day's absence, forfeit two Days Pay to the use of *Greenwich Hospital.*"

Penalty of
Mariners ab-
senting from
Ship without
leave.

By *Secl. 6.* "If any Seaman, not entering into the Service of His Majesty, shall leave the Vessel to which he belongs, before he shall have a Discharge in writing from the Master or other Person having the charge of such Vessel, he shall forfeit one Month's Pay."

Of leaving
the Ship after
arrival, and
before Dis-
charge.

By *Secl. 7.* "On the arrival of any Vessel in *Great Britain* from Parts beyond the Seas, the Master shall pay the Seamen their Wages, if demanded, in thirty Days after the Vessel's being entered at the Custom-house (except where a Covenant shall be entered into to the contrary) or at the Time the said Seamen shall be Discharged, which shall first happen, deducting out of the Wages the Penalties by this Act imposed; under Penalty of paying to such Seamen that shall be unpaid, 20 s. over and above the Wages, to be recovered as the Wages may be recovered; and such Payment of Wages shall be good in Law, notwithstanding any Action, Bill of Sale, Attachment or Incumbrance whatsoever."

Wages to be
paid in 30
Days after
arrival.

By *Secl. 8.* "No Seaman, by signing such Contract, shall be deprived of using any Means

Means

Means for the Recovery of Wages, which he may now lawfully use; and where it shall be necessary that the Contract in Writing should be produced in Court, no Obligation shall lie on any Seaman to produce the same, but on the Master or Owner of the Ship; and no Seaman shall fail in any Action or Process for recovery of Wages, for want of such Contract being produced."

By *Secl.* 9. "The Masters or Owners of Ships shall have Power to deduct out of the Wages of any Seaman all Penalties incurred by this Act, and to enter them in a Book, and to make Oath, if required, to the Truth thereof; which Book shall be signed by the Master and two principal Officers belonging to such Ship, setting forth, that the Penalties contained in such Book are the whole Penalties stopt from any Seaman during the Voyage; which Penalties (except the Forfeitures of Wages to the Owners, on the Desertion of any Seaman, or on refusing to proceed on the Voyage) shall go to the use of *Greenwich Hospital*, to be paid and accounted for by the Masters of Ships coming from beyond the Seas, to the same Officer at any Port, who collects the 6 *d.* per Month, which Officer shall have Power to administer an Oath to every Master touching the Truth of such Penalties."

By *Secl.* 10. "If any Masters or Owners of Ships shall deduct out of the Wages of any Seaman, any of the Penalties by the Act directed to the Use of *Greenwich Hospital*, and shall not pay the Money to some Officer who collects the 6 *d.* per Month in the Port where the Deduction shall be made, within three Months after such Deduction, they shall forfeit

forfeit treble the Value to the use of the Hospital; which, together with the Money deducted, shall be recovered by the same Means as the Penalties for not duly paying the 6*d.* per Month."

By *Seet.* 11. "This Act shall be a Public Public Act. Act."

By *Seet.* 13. "Nothing in this Act shall Aft not to de-
debar any Seaman from entering into the Ser-
vice of his Majesty; nor shall such Seaman from entering
for such Entry forfeit the Wages due to him into the
during his Service in such Merchant Ship, King's Ser-
vice;
nor shall such Entry be deemed a Desertion."

By Stat. 2 *Geo.* 3. c. 31. "This Act is per-
petuated and extended to his Majesty's Colo-
nies in *America*, the Penalties there, to *Green-*
wich Hospital, to be paid to such Person as
the Commissioners of the Admiralty shall di-
rect: Master deducting, and not paying the
same in three Months, shall forfeit treble to
the said Hospital." 2 *Burn.* 423.

See Stat. 31 *Geo.* 2. *Seet.* 16.

II. The Master hath the supreme Rule on
Ship-board, and by that Means his Power and
Authority is by Law much countenanced, es-
pecially in the keeping his Crew in Peace so
long as they eat his Bread; and if a *Mariner*
shall happen to be bruised or hurt in doing his
Duty and Service, the Master * is to take
Care that he be carefully looked after, in or-
der to the procuring his Recovery; and if it
be occasioned by the Miscarriage of another
on Ship-board, he may refund the Damage
out of his Wages, but still remembering who
gave the first Assault.

If it happens that the Master commands
his Boat to be manned out, and it so hap-
pens that the same is out of order, or unfit

* *Per Leg.*
Oleron, cap. 6.
Per Leg. de
exerc. act. &
l. in fin Naut.
Caup.

to take the Sea, the Tews or other Accoutrements being impotent, if the *Mariners* happen to be drowned, the Master is to repay by the Law *Marine* one whole Year's Hire to the Heirs of the Drowned: Therefore Masters ought carefully to view and see that the Boat be fit for Men to trust their Lives in, upon his Command.

If a *Mariner* shall commit a Fault, and the Master shall lift up the Towel three times before any *Mariner*, and he shall not submit, the Master at the next Place of Land may discharge him; and if he refuseth to go ashore, he shall lose half his Wages, and all his Goods within the Ship. If the *Mariner* shall submit, and the Master will not receive the same, he shall have his whole Wages; or if the *Mariner* shall depart the Ship on the Master's Command, and the Master happens not to take another, if any Damage happens to Ship or Goods, the Master must answer.

Per Leg. Oléron, cap. 14.
Per Leg. Oléron, cap. 13.
Et per Leg. Denmark.

III. *Mariners* must help one another at the Sea and in Port; if any refuse, upon the Oaths of his Fellows, he loseth his Wages. None of the Crew must or ought to leave the Ship, without Leave of the Master, when she comes to a Port, or rides at Anchor, but always constantly to wait upon her till they are discharged, or have leave, at least half to be left on Ship-board.

Leg. nemo de Reg. jur. Et Leg. plerumque de in jus vos.

A *Mariner* may not carry out of the Ship above one Meal's Meat, but Drink not a drop; and when on Ship-board, ought not to be there arrested for Debt, but only so much of his Wages in the hands of the Master attached: Yet this is doubted, if it be not on a sworn Debt, that is, a Judgment or Sentence, or a Penalty to the King.

They

They ought not to depart from on Ship-board when once admitted into their full Pay (which is always when they break Ground) without Licence of the Master; and before they may so do, they are to leave a sufficient number to guard the Ship and Decks.

See the several Acts of the 7th and 8th William III. *cap.* 21. Intituled an Act for the Increase and Encouragement of Seamen; and of the 8th and 9th of the same King, *cap.* 23. Intituled an Act for the further Increase and Encouragement of Seamen, for registering of Seamen, and providing for their Widows and Children in such manner as therein is mentioned, too large to be recited here.

By Stat. 9 Ann. *ch.* 21. the Registering of Seamen is repealed.

IV. If the Ship breaks Ground, and is set sail, if after she arrives at her desired Port, their full Pay continues till she returns; nor may they in any wise depart from on Ship-board without Leave or Licence of the Master; if they do, and any Disaster happens, they must answer: Yet at such Port if the Vessel be well moored and anchored with two Cables, they may go without leave, yet so as they leave a sufficient number behind to guard the Decks: But then their return must be in due Season; for if they make longer stay, they must make Satisfaction. *Leg. Oleron, cap. 5.*

V. If *Mariners* get drunk and wound one another, they are not to be cured at the Charge of the Master or Ship; for such Accidents are not done in the Service of the Ship: But if any of the *Mariners* be any ways wounded, or do become ill in the Service of the Ship, he is to be provided for at the Charges of the Ship; and if he be so ill as

not fit to travel, he is to be left ashore, and Care to be taken that he hath all Accommodations of Humanity administered to him: And if the Ship is ready for a Departure, she is not to stay for him; if he recover, he is to have his full Wages, deducting the Master's Charges which he laid out for him.

Leg. Oleron,
cap. 11.

VI. In Case of Storm, if Goods are cast over-board for lightening the Ship, the Oaths of the *Mariners*, swearing that it was done for the Preservation of the Vessel and the rest of the Lading, shall discharge the Master.

So Goods damnified at Sea, are cleared by the Oath of the Master and *Mariners*, by the Laws of *Oleron*.

Leg. Oleron,
cap. 13.

To assault the Master on Ship-board, is a Crime that subjects the *Mariner's* Hand to be cut off, unless he redeems it at 5 *Solz*.

Consolat. del.
mere.

VII. If a Ship happens to be seized on for Debt, or otherwise to become forfeited, the *Mariners* must receive their Wages, unless in some Cases where their Wages are forfeited as well as the Ship; or if they have Letters of Marque, and instead of that they commit Piracy, by reason of which there becomes a Forfeiture of all: But Lading of prohibited Goods aboard a Ship, as Wool, and the like, though it subjects the Vessel to a Forfeiture, yet it disables not the *Mariner* of his Wages; for the *Mariners* having honestly performed their Parts, the Ship is tacitly obliged for their Wages: But if the Ship perishes at Sea, they lose their Wages, and the Owners their Freight. And this being the Marine Custom, is allowed by the *Common Law* as well as the *Civil Law*.

Roll's A-
bridg. 530.

If she comes to her first delivering Port they have Wages till then: If lost afterwards, they

they only lose those subsequent Wages. L. Raym. 631. Q. this, and see L. Raym. 739. where they lost part of their first Wages.

VIII. The Courts at *Westminster* have been very favourable to *Mariners* in order to the suing for Wages, for at the *Common Law* they cannot join, but must sue all distinct and apart for their Wages.

Yet in the Admiralty they may all join, ^{1 Vent. 146.} and the Courts at *Westminster* will not grant ^{343. 2 Vent. 181.} a Prohibition: And so it was ruled, where one ^{2 Keble 779.} Jones † a Master of a Ship was sentenced in ^{† Winch. Rep. 8.} the Admiralty for Wages at the Suit of poor *Mariners*, a Prohibition being prayed upon a Suggestion that the Contract was made at Land, and not *super altum Mare*; the Court denied it, for that he came too late, Sentence being given below against him: Yet if the *Mariners* had only libelled, and there had been no Sentence, and the Defendant had prayed a Prohibition, as above, the Court would have denied it. This hath been, and is usually done.

It was by meer Indulgence that *Mariners* were permitted to sue in the Admiralty for their Wages: And this Indulgence was, be- ^{Salk. 33. pl. 4.} cause the Remedy in the Admiralty was the easier and better; easier because they must sever here, whereas they may join there; and better, because the Ship itself is answerable; but it is expressly against the Statute, tho' now *Communis Error facit Jus*. The first instance of it is in *Winch. 8*. Yet it was never allowed the Master should sue there; nor is ^{Com. Rep. 74.} it reasonable where he commenceth the Voy- ^{Carth. 518.} age as Master; for tho' the *Mariners* contract upon the Credit of the Ship, the Master doth

contract on the Credit of the Owners. L. Raym. 397. *ad idem*.

Salk. 33. pl. 5. But yet the Mate may sue in the Admiralty for his Wages, because he contracts with the Master, as the rest of the Mariners do. L. Raym. 632, *ad idem*.

Sitwell & al. But the Court will be very well informed, Owners of a Ship, *vers.* that the Libel is for *Mariners Wages*; for some who work Carpenters work, and such like Labour, aboard a Ship in a Haven or Port within the Realm, which is *infra Corpus Comitatus*, (notwithstanding those great and ingenious Objections against it) and must be tried by the *Common Law*, and not elsewhere, will libel under that Cloak for *Mariners Wages*. But the Court in that Case will grant a Prohibition. And so it was done in the like Cases.

But if a Ship rides at Anchor in the Sea, and the Master sends his Boat ashore for Victuals or other Provisions for the Ship, and accordingly the *Providore* or Slop-seller does bring Victuals and Provisions aboard; in that Case if the Contract be made there, it must be sued for in the Admiralty: But if the Goods are by the Purser or *Mariners* contracted for at Land, they must sue at *Common Law*.

Latch. fol. 11.

But a Suit in the Admiralty for Seamen's Wages grown due in the River, tho' no Voyage made, was not prohibited. L. Raym. 1044.

Nor tho' made by Writing at Land; or even by Deed. (2. of this last Point.) L. Raym. 1206.

The Master cannot sue in the Admiralty for his Wages. L. Raym. 576.

Master of a Ship prohibited to sue the Part-Owners in the Admiralty for Seamen's Wages which he had paid; for that Privilege and

and Indulgence to Seamen is personal, and cannot be transferred. *Fortes. Rep.* 230.

IX. If Goods are so imbezzled, or so damaged that the Ship's Crew must answer, the Owners and Master must deduct the same out of their Freight to the Merchants, and the Master out of the Wages of the *Mariners*; for tho' Freight is the Mother of Wages, so is it the very Father of Damage; for before the *Mariner* can claim his Wages out of what the Ship hath earned, the Ship must be acquitted from the Damage that the Merchant hath sustained by the Negligence or Fault of the *Mariners*: And the Reason is, for that as the Goods are obliged to answer the Freight, so the Freight and Ship is tacitly obliged to clear the Damage; which being done, the *Mariners* are then let in to their Wages. This Doctrine cited, L. Raym. 650.

X. If a *Mariner* be hired, and he deserts the Service before the Voyage ended, by the *Law Marine* he loses his Wages: And the same Custom at *Common Law* pleaded, it hath been conceived will bar him.

If a *Mariner* shall commit any wilful or negligent Fault, by reason of which the Master, Owners, or the Ship answers Damage to the Merchant, an Action lies well against him.

In a Suit for *Mariners Wages* 'twas agreed, 1 Sid. 236. That if the Ship do not return, but perishes by Tempest, Enemy, Fire, &c. the *Mariners* shall lose their Wages; for if the *Mariners* shall have their Wages in these Cases, they will not use their best Endeavours, nor hazard their Lives to preserve the Ship, 1 Sid. 179. But if the Ship unlade, they shall have their Wages; in the Case of *Culleneal v. Mico*, *Keb. Rep.* 831.

If a Seaman be pressed, he shall have his Wages *pro rata*. L. Raym. 1211.

XI. If a *Mariner* takes up Monies or Cloaths, and the same is entered in the Purser's Book, by the Custom *Marine* it is a Discount or a Receipt of so much of their Wages as the same amounts to; and in an Action brought by them for their Wages, the same shall be allowed, and is not accounted mutual, the one to bring his Action for the Cloaths, and the other for his Wages.

Pasch. 27 Car.
in B. R. Pid-
geon ad sess.
Arges per
L. C. J. Hale.
Leg. Oleron,
c. 13.

XII. A Master of a Ship may give moderate and due Correction to his *Mariners*, and if they bring an Action against him, he may justify the same at the *Common Law*; and by the Law of *Oleron*, if a *Mariner* shall assault the Master, he is to pay 5 *Solz*, or lose his Hand.

Per Leg. Ole-
ron, c. 18.

Mariners after they have unladen the Ship, if they demand their Wages, and there be any Intention of their Departure, the Master may detain a reasonable Proportion of the same till they bring back the Ship, or give Caution to serve out the whole Voyage.

XIII. *Barretry* of the *Mariners* is a Disease so epidemical on Ship-board, that it is very rare for a Master, be his Industry never so great, to prevent it; a Span of Villany on Ship-board soon spreads out to a Cloud, for no other Cause, but of that circular Encouragement that one knavish *Mariner* gives another.

Just. de ob.
jura ex dilect.
§. Fin.

However, the Law does in such Cases impute *Offences* and *Faults* committed by them to be *Negligences* in the Master; and were it otherwise, the Merchant would be in a very dangerous Condition.

Pasch. 11 Jac.
in B. R. Hern
versus Smith.

The Reasons why they ought to be responsible, are, for that the *Mariners* are of his own chusing, and under his Correction and Government,

vernment, and know no other Superior on Roll's A-
Ship-board but himself; and if they are faulty ^{bridg.}
he may correct and punish them, and justify ^{533.}
the same by Law: And likewise if the Fact
is apparently proved against them, may re-
imburse himself out of their Wages.

XIV. And therefore in all Cases where so- *Naut. Caup.*
ever the Merchant loads aboard any Goods or *Stab. Leg. 1.*
Merchandize, if they be Lost, Imbezzled, or *§. 3, 6, & 7.*
any other ways Damnified, he must be re- *1 Ven. 190,*
sponsible for them; for the very lading them *238.*
aboard makes them liable, and that as well *Raym. 220.*
by the *Common Law* as the *Law Marine.* *1 Mod. 85.*
2 Lev. 69.

XV. Nay, if his *Mariners* go with the *Gloss. supercod.*
Ship-Boat to the Key or Wharf to fetch Goods *Señ. verb. &*
on Ship-board, if once they have taken Charge *factum.*
of them, the Master becomes immediately
responsible, if they Steal, Lose, Damnify or
Imbezzle them.

XVI. The antientest Record that is found
extant, is that in *Edward* the Third's Time,
where one brought an Action of Trespass
against the Master for the Imbezzlement by
his *Mariners* of twenty-two Pieces of Gold,
Bow, Sheaf of Arrows, Sword, and other
things; and adjudged he should answer. And
for that the same is or may be of great Mo-
ment, accept of a Transcript of the Record,
as the same was certified into *Chancery*, in or-
der to have it sent into the *King's Bench*, to
enable the Plaintiff to bring an Action upon
the same Judgment in any Place in *England*,
where he could meet with the Defendant.

“ Venerabili in Christo Patri Domino J. *Brevia Regis*
Dei gratia Wygorn' Episcopo Domi- *in Turre Lon-*
ni Regis Ed. Cancellario vel ejus locum te- *don. Trin. An-*
nenti sui humiles & devoti, Robertus Gyene, *no 24 E. 3. m*
Major *45. Bristol.*

Major Ville Bristol, Edwardus Blankeit, & Johannes de Castle-acre Ballivi libertatum ejusdem Ville, salutem cum omni reverentia & honore. De tenore & Recordi & processus loquele que fuit coram nobis in Cur' Domini Regis ibidem sine brevi inter Hen. Pilk & Jurdanum Venore Magistrum Navis vocat la Graciane de Bayone in pl'ito transgress' prout per breve Domini Regis nobis directum fuit vobis inde certificatur, sub sigillis nostris vobis si placit mittimus in hiis scriptis. Ad placit' *Tolls* tent' ibidem die Martis prox' post Festum *Epiphania* Domini anno Regni Regis nunc 24 Hen. Pilk. quer' opt' se versus Jurdanum Venore Magistrum Navis vocat' la Graciane de Bayone de pl'ito transgress' per' pl' &c. & unde quer', quod secundum legem & consuetudinem de *OLERON* unusquisq; Magister Navis tenetur respondere de quacunque transgress' per servientes suos in eadem fact', & Johannes de Rule & Barcolet de Bornes servientes predicti Jurdani Magistri Navis predictæ die Mercur. prox' ante Festum omnium Sanctorum Anno Regni predicti Regis Ed. 23. in Mari juxta Britan. in eadem navi de Johanne de Cornub' servient' predict' 22 libr' in auro, arcus, sagit' glad. & al' bona & catalla ad valenc'. 40 *l.* ceperunt & asportaverunt injuste, &c. ad dampnum predict' Hen. 60 *l.* & si predictus Jurdanus hoc velit dedicere, predict' Hen. paratus est verificare, &c. Et predictus Jurdanus venit & dicit quod lex de *Oleron* talis est quod si aliqua bona & catalla Magistro aliqujus Navis liberata sunt custodiend', unde idem Magister pro eisdem vel pro aliqua alia re in eadem navi facta manucap' illo modo Magister Navis tenetur respondere; non alio modo,

modo, & sup' hoc petit Judicium. Et predict' Hen. dicit, quod unusquisque Magister tenetur respondere de quacunque transgressionem per servientes suos in Navi sua fact' & petit Judicium similiter. Et sup' hoc predict' partes habent diem hic die Sabbati prox' post Festum sci. Hillarii prox' futur' ad audiend' Judicium suum, &c. Ad quem diem predictæ partes venerunt & petierunt Judicium suum, &c. Et recitat Recordo & processu predictis in plena Curia coram Majore & Bailivis & aliis probis hominibus Ville & Magistris & Marinariis, visum fuit Curie, quod unusquisq; Magister Navis tenetur respondere de quacunque transgressionem per servientes suos in Navi sua facta. Ideo consideratum est, quod predict' Hen. recuperet dampna sua 40 l. versus predict' Jurdanum per Cur. taxat' & nihilominus idem Jurdanus transgressionem predicta in misericordia."

The Judgment in this Case is according to Law, and ought not to

have been a *capiatur*; for it is not such a Trespass as the King is entitled to a Fine, *Vide Cro. Jac. 224. Yelv. 162. Buddle versus Morris. Coke's Entries, fol. 347.*

XVII. The Master subject to answer Damage, is to be understood in all such Cases where the Lading was brought aboard either by his Consent or his Purser's; for any other, *Leg. in fin. Naut. Caup. per leg. itaque de furtis.* or such as shall be secretly brought in, not being entered in the Purser's Book, or in the Bills of Lading, the Master is not obliged to see forth-coming, unless it be such Goods as the Parties bring into the Ship about them, as Clothes, Money, and the like, as above, those things being seldom entered, yet most commonly those that are visible, the Master by Law is responsible for.

XVIII. So likewise if a Master forewarn a Passenger to keep his Goods, and that he will *Eod. Leg. in fin. Naut. Caup. & per.*

*leg. itaque de
cod. edit.
Bart. & Jason
in leg. non so-
lum.*

no ways take Care of them, and if they be lost or purloined by the Crew, he will not be obliged to see them forth-coming; the Master is not there held responsible in Case of a Loss, especially if there be any thing of Agreement thereunto.

*§. mortem de
non oper.*

XIX. But if Goods shall be sent aboard a Ship, and the Master shall appoint a Cabbin for the same, and deliver the Key to the Lader, and tell him he will not be responsible if a Loss happens; yet if the Goods are stole, he must notwithstanding make Satisfaction: By the *Common Law* it shall bind an Inn-keeper. *Mo. 78.*

*3 Coke 33. a.
Mo. 158.
Salk. 18.*

But if the Inn-keeper desires his Guest to put his Goods in such a Chamber under Lock and Key, &c. and then he will warrant, otherwise not, and the Guest leaves them in an outer Court, where they are stole, &c. the Inn-keeper shall not be charged.

*Mich. 27 Car.
2. per Lord
Chief Justice
Hale,*

Note, That Goods once delivered to a Master, the Cargo is not subject to be attached in his Hands, nor can any Custom whatsoever support the same; for they are in Law as it were bailed to the Ship, until the Freight and all other Charges are paid: And very much doubted, whether an Attachment can be made in *London* of any Goods at all lying on Ship-board in the River of *Thames*, (which, though the Port of *London*) notwithstanding Freight and all other Charges are paid off.

*Hill. 8 Annæ
in Chancery.
2 Eq. Caf.
Abr. 98. pl. 1.*

Commissioners of Bankrupt issued a Warrant to seize Goods of the Bankrupt on board two Ships in *Topsam Bay* in *Devonshire*; the Goods were consigned to Persons in *Holland*, who had not paid the Bankrupt for them: The Masters refused to deliver the Goods,
not-

notwithstanding the Warrant; which occasioned the Commissioners coming to demand the Goods, which still were refused.

Sir *Peter King* moved for an Order upon the Masters for their Contempt.

The Court at first greatly doubted, whether they can make an Order in Aid and Assistance of the Warrant of the Commissioners of Bankrupt, the Statute having vested a large Power in them; besides, the Persons to whom the Goods are consigned, would be indebted to the Creditors of the Bankrupt, which Creditors may recover by the Law of *Holland*.

Sir *Peter King*. We shall rather lose the Goods, than follow them into *Holland*.

Lord Chancellor *Cowper*. Their refusing to deliver the Goods upon the Warrant, is no Contempt to this Court, tho' the Commissioners act under a Commission under the Broad Seal. I remember the Queen was applied to, to lay an Embargo upon a Ship in the like Case, but denied; because an Embargo would have affected other Goods in the Ship: The Masters in this present Case have some Colour to detain the Goods; for upon a Delivery of them, they may be disappointed of Freight, and the Assignees of the Commission must stand in the same Place as the Bankrupt, and be subject to his Contract.

But however, an Order was made upon the Masters to deliver the Goods upon Payment of the Freight Money, and the Masters to be indemnified by the Creditors, against a Bill of Lading, which was sent to the Consignees.

C H A P. IV.

Of Freight, Charter-parties, and Demorage.

- I. *The various ways that Ships may be freighted at this Day.*
- II. *The antient way of Freightings.*
- III. *How the same is governed upon the various Contracts, and of Accidents happening to Masters or Laders preventing the Voyage.*
- IV. *Of Agreements parol and in Writing, how construed by the Common Law; what it is.*
- V. *Of Ships laded and unladed before the Voyage begun; their becoming disabled, viz. perish in the Voyage before the same is compleated.*
- VI. *Of Ships Departure considered in reference to Freight and Damage.*
- VII. *Of Freight arising on Trading Voyages, and lost by contingent Actions, considered by the Common Law, and the Law Marine.*
- VIII. *Of Freight becoming due upon the various ways of Contract, or general where none was agreed for.*
- IX. *Of Faults arising from the Freighters; and of the Decease of the Ship in reference to Freight.*
- X. *Faults of Masters arising from taking in Goods more than were contracted for; and of being forced into Ports in his Passage.*
- XI. *Passengers dying, the Ship's Title to their Goods and Concerns.*
- XII. *The Ship in construction of Law how far liable to Freight.*
- XIII. *Ships taken and retaken in War, whether the same destroys the Contract.*
- XIV. *Goods become lost without Fault of the Ship, whether Freight becomes due.*
- XV. *Of Freight contracted with Persons deficient.*
- XVI. *Of Ships contracted for by the Month, to be paid at the Arrival at a Port; Ship is cast away, the Goods saved: Whether the Freight ought to be paid.*

XVII.

XVII. *Covenant mutual in a Charter-party, shall not be pleaded the one against the other. Plea that answers to Part only is ill. Covenant therein by several, yet brought against one only. Covenant by several & quemlibet eorum, may be brought against one only.*

I. **I**N the *Freighting* of Ships, respect is always had to the Ship itself, or else to a certain Part thereof.

Again, the Merchants either Freight her, by the *Month*, or the *entire Voyage*, or by the *Tun*; for it is one thing to Freight a Ship, and another thing to take certain *Tunage* to Freight.

So also it is one thing to be a *Cape-Merchant*, another to be an under *Freighter*.

II. There was of old another way of ^{21 E. 3. Case} *Freighting*; which was, when the Merchant ^{ton's Records} agreed with the Master for a Sum certain to ^{63.} convey his Goods ensured against all Peril; such were to be responsible if any Detriment or Loss happened; but that is now become obsolete.

III. *Freight* is governed generally by the *Naut. camp. Stab. Sc. Leg.* Contract, and varies according to the Agreement, reduced generally into a Writing, commonly called a *Charter-party*, executed between the Owners and Merchant, or the Master in the Behalf of himself and Owners, or himself and the Merchant, or between them all; or else is *Parol*. ^{1. §. quancunque vim. Si quis navem conduxerit, instrumenta consignata sunt. Pekius com. ad Leg. Rhod.}

The Master or Owners generally covenant ^{Art. 20.} to provide a *Pilot* and all other Officers and *Mariners*, and all other things necessary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an Agreement and *Earnest*, ^{Per Leg. Naval. Rhod. Art. 19.} but no Writing, if the same be broke off by the Merchant, he loseth his *Earnest*; but if the

the Owners or Master repent, they lose double the *Earnest*.

Cro. Car. 383. But by the *Common Law* of *England*, the Party damnified may bring his Action of the Case, and recover all Damages on the Agreement.

Per Leg. item If a time be appointed by the *Charity-party*,
§. Si in Leg. and either the Ship is not ready to take in,
locu. or the Merchant not ready to lade aboard, the Parties are at Liberty, and the Party Damnified hath his Remedy against the other by Action, to recompence the Detriment.

If Part of the Lading be on Ship-board, and it happens some Misfortune may overtake the Merchant, that he hath not his full Lading aboard at the time, the Master is at Liberty to contract with another, and shall have Freight by way of Damage for the time that those Goods were aboard after the time limited; for such Agreements being of a Conditional nature Precedent, a Failure, as to a compleat Lading, will determine the same, unless afterwards *affirmed by Consent*. And though it be no Prudence for every Merchant or every Master to depart from the Contract, if it should so fall out, that the Agreement as to the Lading is not performed according to Promise, (seldom or ever done if any Part be aboard) yet it is the highest Justice, that Ships and Masters should not be Infettered, but Free; for otherwise by the bare lading of a Cask or Bale, they might be defeated of the Opportunity of Passage or Season of the Year.

Cro. Car. 383. So on the other hand, if the Vessel is not
3 Levinz 283. ready, the Merchant may ship aboard in another Vessel the Remainder of his Goods, and discharge the first Skipper, and recover Damages against the Master or Owners for the rest. This is grounded upon the like Reason as the former. And

*Per Leg. si ex
 conduct. &
 Leg. si item fun-
 dus & Leg.*

And therefore by the *Law Marine*, Chance, *hec distinctio.*
 or some other notorious Necessity, will excuse *Per Leg. Olen.*
 the Master; but then he loseth his Freight *ren. cap. 21.*
 till such time as he *breaks ground*, and till
 then he sustains the Loss of the Ship.

But if the Fault be in the Merchant, he
 then must answer the Master and the Ship's
 Damage, or else be liable to entertain the
 Ship's Crew ten Days at his own Charge; but
 if after that, then the full Freight: And if *Art. 25. Legem*
 any Damage happens afterwards, the Mer- *Naval. Art.*
 chant must run the Risque of that, and not *29. eod.*
 the Master or Owners. (a) But by the Com- *(a) 1 Mod. 85.*
 mon Law, so long as the Master hath the *Raym. 220.*
 Goods on Ship-board, he must see them forth- *1 Ven. 190,*
 coming. *238.*
2 Keb. 866.
3 Keb. 72, 112,
135.

IV. *Charter-parties* have always, by the
Common Law, had a genuine Construction as
 near as may be, and according to the Inten-
 tion and Design, and not according to the
 literal Sense of Traders, or those that Mer-
 chandize by Sea, yet they must be regularly
 pleaded; and therefore in an Action of Cove-
 nant on an Indenture dated 9 Oct. 38 El.
 wherein was recited, Whereas by Indenture
 of *Charter-party* dated Sep. 8. 38 Eliz. be-
 tween the Plaintiff and Francis Cherry; the
 Plaintiff having hired of him a Ship, for a
 Voyage to *Dantzick*, upon taking Ship it was
 agreed between them, that the Ship should
 be laden with Corn at *Dantzick*, and to sail
 to *Leghorn*. Now by the said Indenture, in
 Consideration the Plaintiff had agreed, that the
 Defendant should have the Moiety of Corn,
quod tunc fuit, or afterwards should be laden in
 the Ship during the said Voyage, the Defendant
 covenanted to pay the Moiety of the Money
 for

for the said Corn, *quod tunc fuit*, or afterwards should be laden, &c. and alledgeth in *facto*, that Oct. 9. 38 Eliz. the Ship was laden with 60 Lasts of Corn, and for not Performance of this Covenant the Action was brought; the Defendant pleaded that the Deed was sealed and delivered Oct. 28. 38 Eliz. & *quod ad tunc vel postea* there was not any Corn laden there, and traverseth the Delivery Oct. 9. or at any time afterwards before the 28 Oct. 38 Eliz. And it was adjudged upon Demurrer, That in regard the Plaintiff declared upon a Deed, dated Oct. 9. 38 Eliz. it shall be intended to have its Essence and Delivery at that time, and no other; and if he should confess it to be delivered at any other time, it would be a Departure from his Declaration, and the Word *tunc* is referred to the Delivery, and not to the Date; and if it were delivered ten Months after the Date, he should not have the Benefit of the Corn laden before the Delivery: And therefore the Defendant was adjudged not to be charged with paying for any Corn before the Delivery of the Deed, the Words of the Deed being, that he should pay for the Corn then laden, &c. which (*then*) is referred to the time of the Essence of the Deed by the Delivery, and not to the Date.

Cro. Ja. 263.
Osley v. Sir
Baptist Hicks.

3 *Bulst. 152.*
1 *Ro. 312.*

Atkinson did contract with *Buckle* for the Carriage of 100 Quarters of Barley, and did promise to deliver unto him the 100 Quarters of Barley, a Ship-board at *Barton Haven*, in the County of *York*, to carry them for him, and for the Carriage thereof did promise to pay to him so much; and *Buckle* promised to carry the same for him, and accordingly brought his Ship to the said Haven, expecting

ing there the Delivery of the 100 Quarters of Barley; but *Atkinson* came not to deliver the same to him, whereupon *Buckle* brought his Action of the Case upon the Promise, and upon *non Assumpsit* pleaded had a Verdict and Judgment, which was affirmed upon a Writ of Error.

Charter-party (*Charta partita*, i. e. a Deed of Writing divided) is all one in the Civil Law, with an Indenture at the Common Law. It settles the Agreement and Bills of Lading, the Contents of the Cargo, and binds the Master to deliver them well conditioned at the place of Discharge, according to the Contents of the Charter-party or Agreement; and for Performance, the Master obliges Himself, Ship, Tackle, and Furniture, to see the same done and performed.

Covenant upon a Charter-party between *Bolton* Owner, and *Lee* and *Morgan* Merchants, Freighters of a Ship, by which *Bolton* put to Freight the Ship in a Voyage to *Guiney* at 48 l. per Menssem, and there was a mutual Covenant between the Parties & *quemlibet eorum modo sequente*, and then divers Covenants follow concerning the Ship's Tackle and Performance of the Voyage; and then a Covenant for the Payment of the Freight (*viz.*) when the Ship arrived at *Guiney*, the Freight then due was upon Notice to be paid in *England*, and when she arrived in *England* the Residue from the time of the last Payment was to be paid. And saith, that at such a time the Ship arrived, and that 6 Months and 10 Days were then past, which came to so much, whereof Notice was given; and that after such a time the Ship arrived at *England*, and that the Freight for 6 Months,

Covenant in-
ter A. of the
one Part, and
B. and C. on
the other, &
quemlibet co-
rum, and the
Action
brought a-
gainst one on-
ly, and well.

from the time of the last Payment, and the Freight came to 287 l. 4 s. and that the Defendant had not paid any of the Sums, upon which the Defendant demurred. And took these Exceptions to the Declaration :

Tarrsley 154.
Salk. 393.
pl. 2.

1. For this that the Action is brought against one of the Defendants only, omitting the other; *sed non allocatur*, the Covenant being between them & *quemlibet eorum* is joint and several of every Part.

2. For that it appears upon Computation, the Plaintiff demanded more upon the first Breach than is due by 30 s. and less than is due upon the second by 16 s. and tho' that the first may be cured by the Jurors finding less, or by the Plaintiff's releasing the Overplus, yet where he demands less than his due, it is incurable; and cited several Books there quoted for that purpose in Assumpsit, where, as in this Case, only Damages are to be recovered; and on the other Part was cited, *Cro. Jack. 498. Pemberton v. Shelton, & 529. Parker v. Curson & uxor, see 2 Levinz 4. Hulme & Sambers, & 2 Vent. 129. Welby & Philips.* Hale Chief Justice took a Difference between this Case of Covenant, and Debt, and held, that after Verdict it had been cured without Question, but upon Demurrer there may be some Doubt, the Demurrer being general, but had the Demurrer been special it had been ill, and ruled Judgment, *pro Quer.* 2 *Levinz 56. & 3 Keble 39. & 50. Bolton and Lee.*

Ad Leg. Rhod.

If Goods are fully laded aboard, and the Ship hath broke Ground, the Merchant on Consideration afterwards resolves not on the Adventure, but will unlade again; by the Law Marine the Freight is due.

And

And if the Ship in her Voyage becomes *unable* without the Master's Fault, or that the Master or Ship be arrested by some Prince or State in her Voyage, the Master may either *mend his Ship, or Freight another.*

*Judg. Oleron,
Leg. ult. ad.
Rhod.*

But if the Merchant will not agree to the same, then the *Freight* becomes due for so much as the Ship hath *earned*; for otherwise the Master is liable for all Damages that shall happen. And therefore if that Ship, to which the Goods were translated, perished, the Master shall answer; but if both the Ships perish, then he is discharged.

*Digest. Paulus,
l. 14. c. 2.
§. 10.*

But if there be extreme Necessity, as that the Ship is in a sinking Condition, and an empty Ship is passing by, or at hand, he may translate the Goods; and if that Ship sink or perishes, he is there excused: But then it must be apparent that that Ship seemed *probable* and *sufficient*.

VI. If a set time be fixed and agreed upon between the Merchant and the Master, wherein to begin and finish his Voyage, it may not be altered by the *Supra Cargo*, without special Commission for that Purpose.

*Leg. qui Romæ
§. Callima-
chus, ff. de
verb. obl.*

If a Master shall weigh Anchor, and stand out to his Voyage after the time covenanted or agreed on for his Departure, if any Damage happens at Sea after that time, he shall refund and make good all such Misfortune: Yet if a *Charter-party* is made, that the Plaintiff shall sail from *London* to *Lisbon* with the first Wind and Opportunity, &c. in Consideration of which the Merchant did covenant to pay so much for Freight; the Ship departs not with the first Wind and Opportunity, yet afterwards *breaks Ground*, and arrives at

Popbam. 161. her Port, the Freight in this Case is become due; for there is nothing can bar the Ship of her Freight but the not Departure, for only that in Law is traversable, being material to avoid the Payment of Freight; but to say the Ship did not depart with the next Wind, is but a Circumstance which in strictness of Law is not traversable.

Angl. Alex. & Jason in dict. §. Callimachus.

If it be agreed, that the Master shall sail from *London* to *Leghorn* in two Months, and Freight accordingly is agreed on, if he begins the Voyage within the two Months, tho' he does not arrive at *Leghorn* within the time, yet the Freight is become due.

2 Vern. 210.

Where the *East-India Company* by Charter-party might keep the Ship a long time in *India*, and did so keep her until she was unfit for Service, and could not come Home; they were obliged in *Chancery* to pay the Damage, tho' by the perusing of the Charter-party it was payable at the Return of the Ship.

2 Vern. 212.

So where no Freight was to be paid for the Cargo outwards but Freight for the Cargo homewards; and the Factor abroad had no Goods to load her homewards, Payment of the Freight was decreed.

2 Vern. 727.

So though the Officers and Mariners gave Bond not to demand Wages unless the Ship returned to *London*; she arrived at a delivering Port, and afterwards was taken by the Enemy. They had their Wages to the delivering Port.

Leg. Relegati ff. de pœnis & Leg. ult. de Sep. vio.

VII. If the Ship is freighted from one Port to another Port, and thence to a third, fourth, and so home to the Port from whence she first sailed, (commonly called a *Trading Voyage*) this is all but one and the same Voyage.

age, so as it be in Conformity to the *Charter-party*.

A Merchant agrees with a Master, that if *Trin. 9. Jac.* he carries his Goods to such a Port, he *in C. B. Rot.* will then pay him such a Sum; in the Voy- *638.* age the Ship is assaulted, entered and robbed *Bright versus Cooper,* by Pirates, and part of her Lading taken *1. Brownl. 21.* forth, and afterwards the Remainder is brought to the Port of Discharge, yet the Sum agreed upon is not become due, for the Agreement is not by the Master performed.

But by the *Civil Law* this is *vis major* or *casus fortuitus*, there being no Default in the Master or his Mariners, and the same is a Danger or Peril of the Sea, which if not in Naval Agreements expressed, yet is naturally implied: For most certain, had those Goods, *1 Co. 97.* which the Pirates carried away in stress of *Shelley's Case.* Weather, *Navis levandæ causa*, been thrown *Reginer and Fogassa's* over-board, the same would not have made *Gale. Plowden Com. 1.* a Disability as to the Receipt of the Sum *But a Pirate is not an Enemy.* agreed on; for by both the *Common Law* and *my. Vide* the *Law Marine*, the Act of God, or that of *Chap. Piracy.* an Enemy, shall no ways work a Wrong in Actions private.

VIII. If a Ship be freighted by the Tun, and she is full laden according to the *Charter-party*, the Freight is to be paid for the whole; otherwise but for so many Tun as the Lading amounted to.

If Freight be contracted for the lading of *Leg. si quis* certain Cattle, or the like, from *Dublin* to *Cod. de justit. & substit.* *West-Chester*, if some of them happen to die before the Ship's Arrival at *West-Chester*, the whole Freight is become due as well for the Dead as the Living *.

But if the Freight be contracted for the *Arg. Leg. scio ff. de anno legat. & leg. illis libert. in* transporting them, if Death happens, there

*fin. ff. de condit.**& demon.**Arg. 7.**† Leg. qui ope-**ras & Leg. si**ades §. cum**quidam & §.**fin. ff. locati**Leg. sed &**ades in §. Si**quis mulierem**ff. locat.*

There are 3
Bills of lading
generally
made, the
one to be sent
over Sea to
him whom
the Goods are
consigned to,
the other for
the Master,
and the last
for the Mer-
chant or
Lader.

arise due no more Freight than only for
such as are living, at the Ship's Arrival at
her Port of Discharge, and not for the
Dead †.

If the Cattle or Slaves are sent aboard, and
no Agreement is made either for lading or
transporting them, but generally, then Freight
shall be paid as well for the Dead as the
Living.

If Freight be contracted for the transport-
ing of Women, and they happen in the Voy-
age to be delivered of Children on Ship-
Board, no Freight becomes due for the
Infants.

The *Charter-party* does settle the Agree-
ment, and the Bills of Lading the Contents of
the Cargo, and binds the Master to deliver
them well conditioned at the Place of Dis-
charge, according to the Contents of the
Charter-party or Agreement; and for Per-
formance, the Master obliges Himself, Ship,
Tackle and Furniture to see the same done
and performed.

If Goods are sent aboard, generally the
Freight must be according to Freight for the
like accustomed Voyages.

If a Ship shall be freighted and named to
be of such a Burden, and being freighted by
the Tun shall be found less, there shall no
more be paid than only by the Tun for all
such Goods as were laded aboard.

If a Ship be freighted for two hundred
Tuns or thereabouts, the addition of *there-*
abouts is commonly reduced to be within five
Tun, more or less, as the Moiety of the
number *Ten*, whereof the whole number is
compounded.

If

o. If a Ship be freighted by the great, and the Burden of it not expressed, yet the Sum certain is to be paid. *Chase & Jones vers. Lovering. Styles 220.*

IX. If the Ship, by reason of any Fault arising from the Freight, as lading aboard prohibited or unlawful Commodities, occasions a Detention, or otherwise impedes the Ship's Voyage, he shall answer the Freight contracted and agreed for. *Leg. penult. § 9. F. de locat.*

If a Ship be freighted out and in, there arises due for Freight, nothing, till the whole Voyage be performed: So that if the Ship die, or is cast away coming home, the Freight outwards, as well as inwards becomes lost. *Trin. 9. Jac. B. R. Bright. vers. Gowers Brownlow, 1 part. 21.*

13th July, 1680, in Chancery, a Part-Owner of a Ship sued the other Owners, for his Share of the Freight of the Ship which finished her Voyage; but the other Owners set her out, and the Complainant would not join with them in setting her out, or in the Charge thereof, whereupon the other Owners complained in the Admiralty, and by Order there, the other Owners gave Security, That if the Ship perished in the Voyage, to make good to the Plaintiff his Share, or to that effect; in such a Case, by the Law Marine, and Course of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir Lionel Jenkins to certify the Course of the Admiralty, who certified accordingly, and that it was so in all places, for otherwise there would be no Navigation, whereupon the Plaintiff's Bill was dismissed. See more of Freight, and the Incidents thereunto, *Lex Mercatoria* 100.

X. If a Master freights out his Ship, and afterwards secretly takes in other Goods unknown to the first Ladens, by the Law Ma- *Leg. Oleron. Leg. Naval. Rhod. Art. 20.*

if he loses his Freight; and if it should so fall out, that any of the Freighter's Goods should for Safety of the Ship be cast over-board, the rest shall not become subject to the Average, but the Master must make good that out of his own Purse: But if the Goods are brought into the Ship secretly against his Knowledge, it is otherwise; and Goods so brought in, the same may be subjected to what Freight the Master thinks fitting.

Consol. del Mer.

Leg. Oleron.

Rule.

Leg. Consolat. del Merc.

P. Will. 140.

Bald in leg. centi juris in 4. 2. in verb.

If the Ship puts into any other Port than what she was freighted to, the Master shall answer Damage to the Merchant; but if forced in by Storm or by Enemy, or Pirates, he then must sail to the Port conditioned at his own Costs.

Generally the touching at several Ports by Agreement, imports not a Diversity, but a Voyage entire

XI. If Passengers having Goods, happen to die on Ship-board, the Master is to inventory their Concerns, and the same may keep a Year; and if none claim the same, the Master becomes Proprietor defeasable: But the Bedding and Furniture of the Parties become the Master's and his Mates, and the Cloathing are to be brought to the Ship-Mast-Head, and there praised and distributed amongst the Crew, as a Reward for their Care of seeing the Body put into the Sea.

The Captain died leaving Money on board, the Mate became Captain, and improved the Money: He shall, on Allowance for his Care in the Management of it, account for the Profits, and not for the Interest only.

XII. The Lading of the Ship in Construc-
tion of Law, is tacitly obliged for the Freight,
the same being, in Point of Payment, pre-
ferred

ferred before any other Debts to which the Goods so laden are liable, though such Debts, as to time, were *precedent* to the Freight; for the Goods remain as it were bailed for the same: Nor can they be *attatched* in the Master's Hands, though vulgarly it is conceived otherwise.

Ships deserve *Wages* like unto a Labourer; and therefore in the Eye of the Law, the Actions touching the same, are generally construed favourably for the Ship and her Owners: And therefore if four Part-Owners of five, shall make up their Accounts with the Freighters, and receive their Proportions, yet the fifth Man may sue singly by himself without joining with the rest; and this as well by the *Common Law* as the *Law Marine*.

XIII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battle is re-taken by another Ship in Amity, and Restitution is made, and she proceeds on in her Voyage, the Contract is not determined, though the taking by the Enemy divested the Property out of the Owners; yet by the Law of War that Possession was defeasible, and being recovered in Battle afterwards, the Owners became re-invested: So the Contract, by Fiction of Law, became as if she never had been taken, and so the entire Freight becomes due.

Covenant by a Charter-party, that the Ship shall return within the River of *Thames* by a certain time (*periculis & casualitatibus Marium, Anglicè*, Dangers of the Sea, *exceptis*) and after in the Voyage, and within the time of the Return, the Ship was taken upon the Sea, *per homines bellicosos modo guerrino arraiatos*, to the Covenantor unknown, &c. & abinde

Quid ergo Cod. locat.

Stanley versus Ayles by Hale, 3 Keble 444.

7 R. 2. Statham Abridg. 54.

In Jure Possessionis leg. re-tor. & leg. in bello, §. 1.

abinde hac usque detenta fuit by them, *per quod* he could not return within the River of *Thames* within the time mentioned in the Covenant. Resolved this Impediment was within the Exception, for these Words intend as well any Danger upon the Sea by Pirates and Men of War, as Dangers of the Sea by Shipwreck, Tempest, or the like. *Pickering and Barkley, Stiles 132. & 2 Roll's Abridg. 248.*

Boyes v. Cole,
Hill. 26, 27
Car. 2. B. R.

XIV. If Freight be taken for 100 Tuns of Wine, and twenty of them leak out, so that there is not above eight Inches from the Buge upwards, yet the Freight becomes due: One Reason is, because from that Gage the King becomes entitled to Custom; but if they be under eight Inches, by some it is conceived to be then in the Election of the Freighters to sing them up to the Master for Freight, and the Merchant is discharged. But most conceive otherwise; for if all had leaked out, (if there was no Fault in the Master) there is no Reason the Ship should lose her Freight; for the Freight arises from the Tunnage taken, and if the Leakage was occasioned through Storm, the same perhaps may come into an Average. Besides, in *Bourdiaux* the Master stows not the Goods, but the particular Officers appointed for that Purpose, *quod nota.* Perhaps a special Convention may alter the Case.

When such Misfortune happens, the Insured commonly transfer those Goods over to the Assurers, who take them towards Satisfaction of what they pay by Virtue of their Subscriptions.

Most certain, if a Ship, freighted by the Great, be cast away, the Freight vanishes; but if by the Tun or Pieces of Commodity, and she happens to be cast away, afterwards Part is saved; doubted whether *pro rata* she ought not to be answered her Freight.

Debt

Debt upon a Charter-party upon a Penalty, the Covenant was to pay so much per Tun for Freight, and Breach was assigned in non Payment, for so many Tuns and an Hogshead, which came to so much. Upon Demurrer, 'twas held the Declaration was ill, for the Covenant is only to pay so much per Tun; *aliter* if it had been to pay *secundum ratum* of so much per Tun. *Rae* against *Barns*. 2 *Lo. 146*. 124. *3 Keble* 421.

XV. If a Merchant takes Freight by contracting with a Mariner that is not a Master, if Loss happens, he must be contented to sit down without any Remedy against the Owners; but perhaps such a Mariner for such an Act may subject himself to an Action.

But if there be a Fault committed by a Mariner which was hired, or put in by the Master or Owners; there for Reparation the Owners become liable. *4 Inst.* 146.

XVI. The Master is not bound to answer Freight to the Owners for Passengers, if they are found to be unable to pay. *Johannes Lovicius*, l. 3. c. 8.

If Ship by Charter-party reciting to be of the Burden of 200 Tuns is taken to Freight for a Sum certain, to be paid at her Return, the Sum certain is to be paid, though the Ship amounts not to that Burden.

If a Ship is freighted after the Rate of 20 *l.* for every Month that she shall be out, to be paid after arrival at the Port of *London*; the Ship is cast away coming up from the *Downs*, but the Lading is all preserved; yet the Freight is become due: For the Money arises due monthly by the Contract, and the Place mentioned is only to shew where Payment is to be made, for the Ship deserves Wages like a Mariner who serveth by the Month; and

and though he dies in the Voyage, yet his Executors are to be answered *pro rata*. Besides, the Freight becomes due by indentment on the Delivery or bringing up of the Commodities to the Port of London, and not of the Ship.

Bulstr. 176.
Inst. 204. a
Dy. 76. a.
2 Sand. 350.

If a Man freights a Ship out, and covenants that the Ship with the first Wind and Opportunity should sail out of that Port to *Cales*, and the Freighter covenants that he for the Freight of all the Premises would pay unto the Master *184 l. pro tota transfratatione omnium premissarum*, if the Master doth not aver that the Ship did arrive at the Port of *Cales*, he cannot maintain an Action against the Freighter.

If the Master enters into a *Charter-party* for himself and Owners, the Master in that case may release the Freighters without advising with the Owners; but if the Owners let out to Freight such a Ship, whereof *J. S.* is Master, though the Master covenant in the same *Charter-party* and subscribes, yet his Release in that case will not bind the Owners, but the Owners Release on the other hand will conclude the Master: And the reason is, for that the Master is not made a proper Party to the Indenture. And so it was ruled, where an *Indenture* of *Charter-party* was made between *Scudamore* and other Owners of the good Ship called the *B.* whereof *Robert Pitman* was Master on the one Part, and *Vandenstene* on the other Part; in which Indenture the Plaintiff did covenant with the said *Vandenstene* and *Robert Pitman*, and bound themselves to the Plaintiff and *Robert Pitman* for Performance of Covenants in 600 *l.* and the Conclusion of the Indenture was, — In
witness

witness whereof the said Robert Pitman put his Hand and Seal, and delivered the same; in an Action of Covenant for not performing certain Covenants in this Indenture, the Defendant pleaded the Release of Pitman, whereupon the Plaintiff demurred: And it was adjudged, That the Release of Pitman did not bar the Plaintiff, because he was no Party to the Indenture; and the Diversity in that case was taken and agreed between an Indenture reciprocal between Parties on the one side, and Parties on the other side, as that was; for there no Bond, Covenant or Grant can be made to or with any that is not Party to the Deed; but where the Deed indented is not reciprocal, but is without a *Between &c.* as *Omnibus Christi fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers several Persons.

If an Indenture of *Charter-party* be made between A. and B. Owners of a Ship of the one Part, and C. and D. Merchants of the other Part, and A. only seals the Deed of the one Part, and C. and D. of the other Part; but in the Indenture it is mentioned that A. and B. covenant with C. and D. and C. and D. covenant with A. B. in this Case A. and B. may join in an Action against C. and D. tho' that B. never sealed the Deed, for he is a Party to the Deed, and C. and D. have sealed the other Part to B. as well as to A. *Clement against Henley, 2 Rolls Abr. 22.*

XVII. Covenant upon a *Charter-party*, by which the Master of the Ship covenants to sail with the first fair Wind to *Barcelona*, and that the Mariners shall attend with a Boat to relade the Ship, and then to return with the first fair Wind to *London*, and to unlade and deliver

Cro. Eliz. 56. Scudamore & P. v. Pitman. Trin. 29. Eliz. 12 B. R. cited in 2 Inst. 673. 2 Levinz 74. Cook & Child, 3 Levinz 138. Gilby versus Copley. que semble contra.

1st Inst. 207. 2d Inst. 207. 3d Inst. 207. 4th Inst. 207. 5th Inst. 207. 6th Inst. 207. 7th Inst. 207. 8th Inst. 207. 9th Inst. 207. 10th Inst. 207.

deliver the Goods, and the Merchants covenant to pay so much for Freight, and so much for Demurrage every Day; the Master brought his Action for the Freight and Demurrage, and declares that he sailed such a Day with the first fair Wind, and upon all the other Points. The Defendant, *quoad* the Freight, that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier*, and made divers Deviations, and by these Delays the Goods were spoiled; and as to the Demurrage, that this was occasioned by the Negligence of the Mariners in not attending with the Boat to relade the Ship, to which the Plaintiff demurred, and *per Curiam pro Quer.* for that the Covenants are mutual and reciprocal, upon which each shall have his Action against the other, but shall not plead the Breach of one in bar of another, for perhaps the Damage of the one side and of the other are not equal. 3 *Levinz* 41. *Cole contra Shallet.* Sir *Tbo. Jones* 216. *Showers* against *Cudmore.*

Plea that answers to Part only is ill.

Cro. El. 268.

pl. 3. 330. *pl.*

10. 433, 434.

Cro. Jac. 27.

1 *Sand.* 27, 28.

2 *Sand.* 127.

Lutw. 1492.

Plowd. 138.

In Covenant the Plaintiff declared, that he covenanted to sail with a Ship to *D.* in *Ireland*, and there to take 280 Men of the Defendant's, and to carry them to *Jamaica*, and the Defendant covenanted to have the 280 Men there ready, and to pay for their Carriage 5 *l.* for each Man, and that the Defendant had not the 280 Men ready, but that he had 180, which he took on board, and carried them, but that the Defendant had not paid for them; the Defendant pleaded that he had the 280 Men ready, and tendered to the Plaintiff, who refused to receive them, but said nothing as to the carrying of the 180 Men, nor to the Payment for them; and for that it was not a Plea to all, Judgment was given for the Plaintiff upon Demurrer, 1 *Levinz* 16. 1 *Keble* 100.

C H A P.

CHAP. V.

Of Wreck.

- I. Of Goods wreckt, as in relation to the Alteration of the Property by the Civil Law.
- II. Of the Preservation of Goods wreckt, and the Punishment of those that shall add Misery to the Condition of such Persons so distressed.
- III. Of Goods wreckt, their Preservation according to the Laws of Oleron, and of England, and of the Punishment of those that shall not make Restitution.
- IV. Of Contribution where the Ship perishes, and the Goods are all saved, and where not.
- V. The King of Great Britain's Prerogative as in relation to Wreck and other Royalties of the Sea.
- VI. Of Flotsam, Jetsam, and Lagan, where the King shall have the same, and whether by the Grant of Wreck the same passes; and where a Subject may prescribe.
- VII. Of Ships wreckt and no Creature in them, yet no Wreck; and of Ships forsaken, whether in Law accounted lost or wreckt, or neither.
- VIII. Of the Sheriff's Duty as in relation to Goods wreckt; and of Owners their time of claiming their Property.
- IX. Wreckt Goods not to pay Custom.
- X. Of Wreck, in the Isle of Wight, not in the Admiral without special Words.

IN matters of *Wreck*, there is, as it were, a Contract between them which have lost their Goods by such Misfortune, and them upon whose Lands the Goods and Merchandize are driven, that the same be restored to them or those that claim under them. And therefore by the *Civil Law*, it is precisely forbid, that no Man shall meddle with such Goods as are wreckt; and such as are proved to have stolen any thing thereout, are holden for

Lex. ne quid ff. de incendio, ruina & naufragio.

Leg. 44. D. de acq. rer. dom. for Robbers; for that such Goods being cast on Land and recovered out of the Sea, remain still his who was the Owner thereof, and descend upon his Successor; neither Escheat to the King, neither to any other to whom the King hath granted such Royal Privilege.

The reason why the Laws were so strictly declared by the *Romans*, was, for that by the Laws of *Rhodes*, if any Ship had become Wreck, though all the Persons were saved and alive, yet the Ship and Goods became seizable by the Lord: But the same being barbarous, was afterwards repealed and abrogated.

The Emperor *Constantine* the Great says, in this Case, if any Ship at any time by any Shipwreck be driven to the Shore, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it: For what Right hath my Exchequer in another Man's Calamity, so that it should hunt after Gain in such a woful Case as this is?*

And yet if no Kindred appear within a Year and a Day, or, appearing, prove not the Goods shipwrecked to be theirs, the Goods come to the *Exchequer*, even by that Law: So much that Law condemns Carelessness, which is written, *vigilantibus & non dormientibus, &c.* And with this agree the Laws of *Oleron* and the Laws of this Land, as taken out of those Imperial Laws, in that Point, as is conceived.

Leg. 1. in pr. de incend. ruin. leg. in eum cum auth. seq. de furt. Leg. 3. in fin. de incend. ruin. naufrag. II. The Civil Law was ever so curious and careful to preserve the Goods of such miserable Persons, that if any should steal such, they should pay four-fold to the Owner, if pursued within a Year and a Day, and as much to the Prince or his Admiral: So careful

ful were they, and so exact in requiring Restitution, that the very stealing of a Nail, or the Worth thereof, obliged the Thief to the Restitution of all the remaining Goods. And by the Emperor *Antonius* it was made a Law for such sort of Men, that they should be battered and banished for three Years; but that was for only those of a high and honourable Rank: But those that were Base and Ignoble, should be scourged and sent to the Gallies or Metal Mines.

*Leg. pedibus
cod.*

And the preventing of Help to such shipwreckt Persons, was punished with the same Suffering as a Murderer.

Arg. leg. singularit. de Extrad. crim.

The like for those that put forth any treacherous Lanthorn or Light, with Intention to subject others to Danger or Shipwreck, these were punished with Death.

And though no Harm happens, yet he may be punished: Hence it is, that Fishers are forbidden to fish with Lights in the Night, for fear of betraying Sailors.

Per leg. incend. ruin. naufrag. Leg. nepiscator.

And here I cannot omit the great and pious Care that his Majesty hath had, in his Directions about Light-Houses and Lanthorns, and other special Sea-marks; but more especially in his erecting, at his own Princely Charge, that most Excellent Light-House near *Goldson* by *Yarmouth*, which, both for Height, Curiosity and Form, is not inferior to, if not excelling, all, or most, in Christendom.

III. And as the Emperor, and other maritime Kingdoms, had in some sort abrogated and repealed that cruel Law, and subjected the Violaters to Punishment for the Inhumanity offered to such distressed Persons; so our famous King *Richard*, returning from the Holy War, in his own Experience at Sea, became sensible of the Miseries which Merchants and Mariners at Sea underwent, their Lives being always within few Inches, often within

an Hair's Breadth of Death; and having Consideration of their Calamities and distressed State in his Voyage, resolved to revoke that Law, and at Oleron in the Bay of *Aquitain* (then part of his Dominions, as Sovereign Lord of the Ocean, and all those Maritime Kingdoms) did there, amongst other good Marine Laws, declare, *That if any Person or living Thing escaped out of any wrecked Ship to Land, it should not be Wreck or confiscated to him or his Successor, as it was before, though all the Men escaped alive.* For before that, both in *England* and in * *Normandy*, the † Crown was entitled to shipwreckt Goods, and the King *Jure Gentium* (indeed according to the *Rhodian Law*) became Heir unto them, which otherwise *Jure naturali* were conceived to be in *bonis nullius*, pertaining to no Owner: But now that Valiant and Religious Prince resolved no longer to embrace so cruel a Prerogative, by the stripping the distressed Mariners of those Rags of their Estates, which the Mercy and Modesty of the Waves and Winds had left them; and therefore in the Month of *October* at *Messana*, in the Presence of many Archbishops, and Bishops, and others, he then for ever quitted the Royal Claim to Wrecks, which afterwards was declared and published at *Oleron* in his own Territories; so that if any Man out of the Ship came alive to Shore, the Property of the shipwreckt Goods were still preserved to the Owner: Which Royal Condescension was so enlarged by our succeeding Kings, *That if a Man, Dog, or Cat escapes alive out of the Ship, neither the Ship or other Vessel, nor any thing therein, shall be adjudged Wreck, but the Goods shall be saved and kept by the Sheriff, Coroners,*

* *Bracton, lib.*

2. cap. 5.

† *Custuma*

Norman. c. 17.

Roger Hoveden

in the latter

part of his

Annals, fol.

678. *Joan.*

Brompton.

Chron. Coll.

fol. 1887.

of the King's Bailiffs, and delivered to the Inhabitants of the Town where the Goods are found; so that if any, within a Year and a Day, *Westm. 1. c. 4. 3 E. 1.* sue for these Goods, and after prove that they were his at the time of the Shipwreck, they shall be restored to him without delay: But if not, they shall be seized by the said Sheriff, Coroners, *2 Inst. 166.* or Bailiffs for the King's use; and shall be delivered to the Inhabitants of the Town, who shall answer before the Justices for the Wreck belonging to the King: But this good Law extends not to Pirates, Per Leg. Olea rates, Robbers, Sea Rovers, Turks, or other *rox, cap. 47.* Enemies to the Catholick Faith.

Where the Wreck belongs to another, he shall have it in like manner; and if any be attained to have done otherwise, he shall suffer Imprisonment, make Fine to the King, and yield Damage also.

If a Bailiff do it, and it be disallowed by his Lord, the Bailiff shall answer for it if he hath wherewithal; but if not, the Lord shall deliver his Bailiff's Body to the King.

IV. If the Ship perishes only, and the Goods are safe, in that Case the Goods ought to pay a Proportion of a fifth or tenth Penny, *Leg. 37. Naval Rhod. 40.* according to the easy or difficult Winning or Saving of the said Goods. Rich Goods, as Gold, and Silver, and Silk, pay less than Goods of great Weight and Cumber, being in less Danger, unless it were a Wreck going into a Port, which the Skipper was not bound for, there *et contra*, then the Skipper is not to be considered.

Goods may be retained for Payment of Salvage. *L. Raym. 393. 2 Salk. 654.*

But if the Ship and Goods perish in the Sea, *pl. 2. See 2 Barnard. B. R. 407.* and the Owners do totally forsake her, and so she becomes a meer *Derelict*, in that Case

the first Possessor that recovers her, or any part of her Lading, gains a *Property*: And this according to the Laws of Nations, *as is that given for lost, whereof there is no Hopes of Recovery*, like a Lamb in the Paws of a Lion. And the incomparable *Ulpian* compares such a *Dereliction* to a Man that knows his own Goods to be by another Man detained, and makes no Claim unto them in a long time; unless some Cause do manifestly appear, seems to do it to no other purpose, but to shew that he is willing to renounce them; and this is it what *Ulpian* elsewhere intends, where he saith, that a House possessed for a long time by another, and no Claim made, nor Rent demanded for it, seems to be deserted by the right Owner.

To exact Interest long since due, saith the good Emperor *Antonius*, is hardly just; for the not demanding it in so long a space, makes it probable that thou wert willing to remit it; and that by not so much as demanding it, thy purpose was to make thyself the more Beloved and Honoured, and thy Debtor the more Thankful.

Now that Silence should be of such a force as to justify our Presumption of a *Dereliction*, two things are requisite; First, That he that is silent knows that he hath a Right; for him that knows it not, Silence cannot prejudice. Secondly, That his Silence be free and voluntary, and not occasioned by Fear, or any other such Cause; and the true Reason is, that it is hardly possible, that in a long time a Man should not by some Means or other arrive at the Knowledge of his own Right, Time daily administring Occasions to the Discovery of Truth.

But

But because that Time, which exceeds the Memory of Man, is in a moral Sense infinite, therefore if Claim be not made with a *reasonable time* to a thing out of Possession, it is a sufficient Presumption that it is *forsaken*, unless some very strong Reasons be brought to the contrary; and therefore the Recovery of the Plate near the *Babama* Rocks, lost near fifty Years before by the *Spaniard*, became most apparently a Derelict, and free not only for the Undertakers to recover and possess, but to keep as a Property justly acquired by them, as well by the Laws of Nations, as the *Civil Law*. *Grotius, lib. 2. cap. 4. §. 5, 6. Duke of Albe-marle & al. in Anno 1687.*

By Stat. 3 Geo. c. 13. *Señ. 6.* (continued to 25th of *March*, 1778. by Stat. 4 Geo. 3. c. 12. *Señ. 1.*) The Lord Warden of the Cinque Ports shall nominate under his Hand and Seal three or more Persons in each of the Cinque Ports, two ancient Towns and their Members, to adjust any Difference relating to Salvage, between the Master of any Ship that has in bad Weather been forced from her Anchor and Cable, and the Persons bring them ashore: And if any Vessel be forced from her Cables and Anchors by Extremity of Weather, and leave the same in any Roads within the Jurisdiction of the Cinque Ports, and the Salvage cannot be adjusted between the Persons concerned, the same shall be determined in twelve Hours, by any one or more of the Persons appointed as aforesaid.

V. The King shall have Wreck of the Sea, Whales, and great Sturgeons taken in the Sea, and elsewhere throughout the whole Realm, except in Places privileged by the King. *17 E. 2. c. 1.*

Ld. Raym.

474. 2 *Mod.*

259.

Ld. Raym.

473.

Also Wreck may be claimed by Prescription; and the Lord High Admiral possibly may have it by Prescription.

A Grant of Wreck to the Lord High Admiral as appertaining to his Office, will not pass Wreck belonging to the King's Manor by Prescription.

Sir Henry Constable's Case,
5 *Coke* 107.

VI. By the Grant of Wreck will pass *Flotsam*, *Jetsam*, and *Lagan*, when they are cast upon the Land; but if they are not cast upon the Land, the Admiral hath Jurisdiction, and not the *Common Law*, and they cannot be said Wreck.

5 *Co.* 106. a.
5 *Co.* 106. b.

Wreccum Maris, are such Goods only as are cast and left upon the Land by the Sea.

Flotsam, is when a Ship is sunk, or otherwise perished, and the Goods float upon the Sea.

Ibid.

Jetsam, is when the Ship is in Danger to be sunk, and for lightning the Ship the Goods are cast into the Sea, notwithstanding which the Ship perisheth.

Ibid.

Brañon, lib.
3. c. 2.

Lagan vel Ligan, is when the Goods being heavy, are cast into the Sea before the Ship perishes, which by the Prudence of the Master or Mariners, who have an Intent to save them so sunk, as that they may come at them again; in order to which they fasten a Buoy, or other light Matter, that they may signify to them where they lie, if Providence should bring them in a Condition to retake them; & dicitur *Ligar à ligando*.

F. N. B. 122.

46 *E.* 3. 15.

Anth. Omnes

peregrini com-

munia de suc-

cessionibus acq.

per Leg. Oloron

5 *Coke* 107.

The King shall have *Flotsam*, *Jetsam* and *Lagan*, when the Ship perisheth, or when the Owners of the Goods are not known; but when the Ship perishes not, *è contra*.

A Man may have *Flotsam* and *Jetsam* by the King's Grant; and may have *Flotsam* within

within the high and low Water-mark by Prescription, as it appears by those of the West-^{2 Inst. 167.} Countries, who prescribe to have Wreck in the Sea; so far as they may see a *Humber* Barrel.

VII. If the Ship be ready to perish, and all the Men therein, for Safeguard of their Lives, leave the Ship, and after the forsaken Ship perishes, if any of the Men be saved and come to Land, the Goods are not lost.

A Ship on the Sea was pursued by Enemies, the Men therein for Safeguard of their Lives, forsake the Ship, the Enemies take the Ship, and spoils her of her Goods and Tackle, and turn her to Sea; by stress of Weather she is cast on Land, where it happened her Men arrived: It was resolved by all the Judges of England, that the Ship was no Wreck, nor lost.

^{5 R. 2. pro. Willigmo Fishlake Co. 2 Inst. f. 167. Leg. 43. §. 11. D. de furt. Pl. Com. 466.}

VIII. If Goods are cast up as a Wreck, and it falls out they be *bona peritura*, the Sheriff may sell them within the Year, and the Sale is good; but he must account to the true Owners.

Owners claiming the Wreck, must make their Proof by their Marks or Coaquets, by the Book of Customs, or by the Testimony of honest Men; and if the Wreck belongs to the King, the Party may sue out a Commission to hear and determine, and that by the Oaths of twelve Men; or else he may bring his Action at Law, and make out his Proof by *Verdict*; but such Action must be brought *within the Year and Day*.

^{F. N. B. fol. 112. c. The Year and Day shall be accounted from the Seizure, 2 Inst. 168. 5 Co. 107. b. 1 Keb. 657.}

Note, *Flotsam*, *Jetsam* and *Lagan*, are Goods on or in the Sea, and belong to the King, who by Charter hath granted them to the Lord Admiral.

Left unre-
solved in *Moor*
fol. 224. But
since adjudg-
ed in C. B.
upon a special
Verdict found
at *St Edmund's*
Bury.
Shephard v.
Gosnold, Hill.
23, 24 Car. 2.
Rott. 615.
Vaughan,
159.

IX. If Goods were wrecked on the Shore; and the Lord having Power, takes them, he shall not pay Custom, neither by the *Common Law* nor by the *Statute*; for at the *Common Law*, wrecked Goods could not be charged with Custom, because at the *Common Law* all *Wreck* was wholly the King's, and he could not have a small Duty of Custom out of that which was all his own; and by *Westm. 1. 1.* where wrecked Goods belonged more to another than to the King, he shall have it in like manner, that is, as the King hath his.

Now Goods that are chargeable with Custom, according to the Act of *Tunnage and Poundage*, must have these Properties.

12 *Car. 2. c. 4.*

1. They must be Goods which shall come or be brought into the Ports or Places of the Kingdom.

2. They must come or be brought into such *Ports* or *Places*, as *Merchandize* that is for Sale, and to that end; for there can be no other Conception of Goods brought as *Merchandize*.

3. They must come and be brought as *Merchandize*, and for Sale by the King's natural born Subjects, or by Strangers and Aliens, as distinguished from the natural Subjects.

4. The Duty payable to the King, is to be measured by the Quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays less to the King; and if an Alien, more.

5. All those Goods charged with the Duty by the *Statute*, so to come, or be brought into Ports or Places of the Kingdom, are to be foreign, as of the Growth of *France*, the *Levant*, *Spain*, *Portugal*, *Germany*, &c.

Whence

Whence it follows, 1. That Goods of foreign Growth, and which by their kind are to pay Duty, if they shall come or be brought into the Ports or Places of the Kingdom, neither by the King's natural born Subjects, nor by Aliens, they are not chargeable with the Duties mentioned in the Act.

2. If they are not brought into the Ports and Places of the Kingdom, as Merchandize, viz. for Sale, they are not chargeable with the Duty; but Wines or other Goods coming or brought into the *Realm as Wreck*, are neither brought into the Kingdom by any of the King's *Natural born Subjects*, nor by any *Strangers*, but by the Wind and Sea; for such Goods want a Proprietor until the Law appoints one.

3. *Wrecked Goods* are not brought into the Kingdom being cast on Shore, as Merchandize, viz. for Sale; but are as all other the native Goods of the Kingdom, indifferent in themselves, for Sale or other Use at the Pleasure of the Proprietor.

4. All Goods foreign or domestick are, in their Nature, capable to be Merchandize, that is, to be sold; but it follows not thence, that wheresoever they are brought into the Kingdom, they are brought as Merchandize, and to be sold, and should pay Custom; for they are transferred from Place to Place, more for other Uses than for Sale.

5. All Goods charged with the Duty of the Act, must be propriated by a Merchant *Natural born*, or Merchant *Alien*, and the greater or less Duty is to be paid, as the Proprietor is an Alien or Native Merchant; but wrecked Goods are not the Goods of any Merchant *Natural born*, *Alien* or *Denizen*, whereby the
Duty

Duty payable should be either demanded, distinguished, or paid; Therefore a Duty impossible to be known, can be no Duty; for *Civilly what cannot be known to be, is as that which is not.*

6. All Goods subject to the Duty of Tunnage and Poundage, may be forfeited by the Disobedience and Misbehaviour of the Merchant-Proprietor, or those trusted by him, as *unshipping before Payment, or lawfully tendering or agreeing for, &c.* But wrecked Goods cannot be imported into any Creek or Place of the Realm by way of Merchandize, and unshipped to be laid on Land; for if so imported and unshipped to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Misbehaviour of any within the Act, and consequently not Goods intended to be charged with the Duties by the Act.

Goods drowned or lost in passing a Ferry, a great River, or an Arm of the Sea, are not to be said to be exported, though they be carried to Sea; but Goods exported are such as are conveyed to Sea in Ships or other Naval Carriages of Man's Artifice; and by like Reason, Goods imported must not be Goods imported by the Wind, Water, or such inanimate Means, but in Ships, Vessels, and other Conveyances used by reasonable Agents, as Merchants, Mariners, Sailors, &c. Whence it may be concluded, that Goods or Merchandize imported within the Meaning of the Act, can only be such as are imported with Deliberation, and by reasonable Agents, not casually and without Reason; and therefore wrecked Goods are no Goods imported within the Intention of the Act, and consequently not to answer the King's Duties; for Goods,

as Goods, cannot Offend, Forfeit, Unlade, pay Duties, or the like, but Men whose Goods they are: And wrecked Goods have no Owners to do those Offices, when the Act requires they should be done; therefore the Act intended not to charge the Duty upon such Goods.

Per Holt, C. J. That Wreck shall not pay Custom, has never been made a Doubt since the Case in *Vaughan* 159. of *Shephard v. Gosnold*, *L. Raym.* 388. The same Point (including *Flotsam*) resolved by both Courts, *L. Raym.* 501. viz. C. B. and then B. R. on Error brought. 502.

The Admirals of England, *ut magnus Admirallus Anglie, Hibernie, Wallie, ac Dominiorum & Insularum earundem, Ville Calisie & Merchiarum ejusdem, necnon Gasconie, Aquitanie, classium & Marium dictorum Regnorum Anglie prefectus generalis, &c.* which are the words of their Patents used at this Day, do claim all Wrecks arising from any of those Places, by virtue of their Grants.

The very Words of the *L. Howard's* Patent, in 28 *Elix. in Rot. Admir. m.* 10.

And yet in the like Case, in all Circumstances, between *Power* and *Sir William Portman*, *Hill.* 6. *William Com. B. Rot.* 1431. where the Judges, and more particularly Justice *Treby*, seemed to be of Opinion, that Goods wrecked, or *Flotsam*, should pay Custom.

X. King *Edward* the Second, in the first Year of his Reign, by his Charter, granted the Castle of *Carisbrook*, with all the Lands and Tenements in the *Isle of Wight*, formerly belonging to *Isabella Fortibus*, Countess of *Albemarle*, to his great Favourite *Peter de Gaveston*, and *Margaret* his Wife, and the Heirs of their two Bodies begotten (together with sundry other Castles and Lands) and commanded

1 *E. 2. m.* 6. num. 6.

commanded *Nicholas de Bosco* to put him into actual Possession; and likewise commanded *Robert de Sanfon*, Keeper of the Forest of *Parkburst* in that Isle, to be Intendent to them for the Farm he had granted him for Life, for the Custody thereof, which being afterwards soon reſeized into the King's Hands, he granted this Caſtle with all its Services, and all his Lands in that Isle, to *Edward* his Son and his Heirs Kings of Eng-
land, and afterwards, for the aſcertaining what did of Right belong to the ſame Caſtle, an Inquiſition went out, by which it was found, *inter alia, qd' wreckum Maris perti- nens ad dictum Caſtrum valet per Ann. 4 s.*

Pat. 20. E. 2.
m. 10. intus
pro Edwardo
filio Regis.

Inquiſit. de An.

47 H. 3. n. 32.

Leg. 3. §. 1. D.

Naut. caup. St

lib. 1. §. 4. D.

de obl. & act.

leg. 26. §. 6.

D. mand.

Quia vis ma-

jor providen-

tiam & indus-

triam humanam

superat, niſi culpa caſum præceſſerit.

Persons con-

vinced of

plundering

ſhipwrecked

Goods, &c.

So that, by the general Patent of the Ad-
miral, will not paſs the Wreck of this Isle,
without ſpecial Words granted in the Patent.

Note, If the Wreck happened, or was oc-
caſioned by reaſon of any Fault or Negli-
gence in the Maſter or Mariners, the Maſter
muſt make good the Loſs; but if the ſame
was occaſioned by the Act of God, to avoid
an Enemy or Pirate, and the like, there he
ſhall be excuſed.

By Stat. 26 Geo. 2. c. 19. Sect. 1. If any

Perſon plunder, ſteal, take away, or deſtroy
any Goods or Effects, from or belonging to
any Ship or Veſſel of his Maſteſty's Subjects,
or others, being in Diſtreſs, wrecked, loſt,
ſtranded, or caſt on Shore, in any Part of his
Maſteſty's Dominions (whether any living Crea-
ture be on board ſuch Veſſel or not) or any of
the Furniture, Tackle, Apparel, Proviſion,
or part of ſuch Veſſel; or beat or wound
with intent to kill, or otherwiſe wilfully ob-
ſtruct

frustrate the Escape of any Person endeavouring to save his Life from such Ship, or the Wreck thereof, or put out any false Light with intention to bring unto Danger, such Person so offending shall be deemed guilty of Felony, and being convicted, shall suffer Death as in Cases of Felony, without Benefit of Clergy.

Or of obstructing the Escape of any Person from a Wreck; or of putting out false Lights, to suffer Death without Clergy.

By *Stat. 2.* When Goods or Effects of small Value be stranded, lost, or cast on Shore, and be stolen without Circumstances of Cruelty or Violence, it shall be lawful for any Person to prosecute for such Offence by way of Indictment for Petit Larceny; and the Offenders being convicted, shall suffer such Punishment as in Cases of Petit Larceny.

Where Goods of small Value shall be stolen without any Circumstances of Cruelty, the Offender may be indicted of Petit Larceny.

By *Stat. 3.* It shall be lawful for any Justice of Peace, upon Information upon Oath, of any Part of the Cargo or Effects belonging to any Ship lost or stranded upon or near the Coasts aforesaid, being unlawfully carried away, or concealed in any House or Place, or of some reasonable Suspicion thereof, to issue his Warrant for the searching of such House or Place, as in other Cases of stolen Goods; and if the same be found in such House or Place, or in the Custody of any Person, not legally authorized or intitled to keep the same, and the Owner or Occupier of such House or Place, or the Person in whose Custody the same be found, shall not upon Demand deliver the same to the Owner, or to such Person as shall be authorized to demand the same; or shall not give a good Account, to the Satisfaction of the Justice, how he became possessed thereof, such Justice, upon proof of such Refusal, shall

Justices upon Information of Shipwrecked Goods being stolen or concealed, to issue search Warrants.

And the Persons in whose Custody the Goods shall be found, not giving a satisfactory Answer, to be committed

commit for 6 Months,

or until pay-
ment of treble
value.

commit the Offender to the common Goal
for six Months, or until he have paid to such
Owner, or to the Person authorized to receive
the same, treble the Value of the Goods un-
lawfully detained.

Goods offered
to sale, sus-
pected to be
shipwrecked,
to be stopd.

By Sect. 4. If any Person offer to Sale any
Goods or Effects belonging to any Ship, lost,
stranded, or cast on Shore, and unlawfully
taken away, or suspected so to have been,
it shall be lawful for the Person to whom the
same be so offered for Sale, or any Officer of
the Customs or Excise, or any Constable, or
other Peace Officer, to stop and seize the said
Goods and Effects; and he shall carry the
same, or give Notice of such Seizure, to some
Justice of Peace; and if the Person who of-
fered the said Goods to Sale, or some other
Person on his Behalf, appear not before the
said Justice, within ten Days next after such
Seizure, and make out the Property of the

And Notice
to be given to
a Justice.

And the Per-
son offering
the same not
making out
his Property,

the Goods
to be return-
ed to the
Owner,

said Goods to be in him, or in the Person by
whom he was employed to sell the same; the
said Goods shall, by Order of the Justice, be
delivered over to or for the Use of the right-
ful Owner, upon Payment of a reasonable
Reward for such Seizure; (to be ascertained
by the Justice) to the Person who seized the
same; and such Justice shall commit the Per-
son who so offered the said Goods to Sale, to
the common Goal for six Months, or until
he have paid to such lawful Owner, or to the
Person authorized to receive the same, treble
the Value of the Goods so unlawfully offered
to Sale.

and the Of-
fender to be
committed
for 6 Months,
or till pay-
ment of treble
value.

Persons who
shall save and
carry any
Vessel or
Goods into

By Sect. 5. In case any Person not employ-
ed by the Master, Mariners or Owners, or
other Persons lawfully authorized, in the Sal-
vage of any Ship, or the Cargo or Provision
thereof,

thereof, in the Absence of Persons so employed or authorized, save any such Ship or Effects, and cause the same to be carried, for the Benefit of the Owners, into any Port, or to any near adjoining Custom-House, or other Place of safe Custody, giving Notice to some Justice of Peace, Magistrate, or Custom-House or Excise Officer, or discover to any such Magistrate or Officer, where any such Effects are wrongfully bought, sold, or concealed, such Person shall be entitled to a reasonable Reward, to be paid by the Masters or Owners of such Vessels or Goods, and to be adjusted in case of Disagreement, in like Manner as the Salvage is to be adjusted and paid by 12 *Ann. Stat. 2. cap. 18.* or in the manner herein after prescribed.

Port, &c. for the Benefit of the Owners, and give Notice thereof;

or who shall discover where such Goods are concealed, intitled to the Rewards:

And the Quantum in case of Disagreement is to be adjusted

according to 12 *Ann. St. 2. c. 18.*

By *Stat. 6.* For the better ascertaining the Salvage to be paid in pursuance of this Act, and the Act before-mentioned, and for putting them in Execution, the Justice of the Peace, Mayor, Bailiff, Collector of the Customs, or chief Constable, nearest to the Place where any Ship or Goods be stranded or cast away, shall forthwith give public Notice for a Meeting to be held as soon as possible of the Sheriff or his Deputy, the Justices of the Peace, Mayors, or other chief Magistrates of Towns Corporate, Coroners, and Commissioners of the Land-Tax, or any five or more of them, who are to give Aid in the Execution of this and the said former Act, and to employ proper Persons for the saving of Ships in Distress, and such Ships and Effects as be stranded or cast away; and also to examine Persons upon Oath concerning the same,

Where any Vessel or Effects shall be stranded, public Notice to be given for a Meeting of the Sheriff, Justices, and Magistrates, &c. who are to aid in saving the Vessel and Goods, &c.

and to adjust the Salvage.

or

43. a Day allowed for their Attendance.

or the Salvage thereof, and to adjust the *Quantum* of such Salvage, and distribute the same among the Persons concerned in such Salvage, in case of Disagreement; and every such Sheriff, Justice of Peace, Mayor, chief Magistrate, Coroner, Lord of a Manor, Under-Sheriff, or Commissioner of the Land-Tax, acting at such Meeting, shall be paid 4 s. a Day for his Expences out of the Effects saved.

If the Salvage be not paid, the Officer of the Customs may raise the same by a Bill of Sale of the Vessel or Cargo; which may be redeemed, upon Payment of Principal and Interest.

By *Secl. 7.* If the Charges and Rewards for Salvage, directed to be paid by 12 *Ann. Stat. 2. cap. 18.* and by this Act, be not paid, or sufficient Security given for the same, within forty Days, it shall be lawful for the Officer of the Customs concerned in such Salvage, to borrow Money sufficient to pay such Charges and Rewards, or any part thereof then unpaid or not secured, upon one or more Bills of Sale, under his Hand and Seal, of the Ship or Cargo saved, or such part thereof as is sufficient, redeemable upon Payment of the Sum so borrowed, and Interest after the Rate of Four *per Cent. per Annum.*

Where Oath shall be made of Plunder or Theft, or of breaking a Ship, contrary to 12 *Ann. St. 2. c. 18.* And the Examination shall be delivered to the Clerk of the Peace, he is to prosecute the Offender;

By *Secl. 8.* If Oath be made before any Magistrate lawfully impowered to take the same, of any such Plunder or Theft, and the Examination in Writing thereupon taken, be delivered to the Clerk of the Peace of the County or Division wherein such Fact is committed, or to his Deputy; or if Oath be made before any such Magistrate of the breaking any Ship, contrary to the 12 *Ann. Stat. 2. cap. 18.* and the Examination in Writing thereupon taken, be delivered to such Clerk of the Peace, or his Deputy; such Clerk of the Peace shall cause the Offender to be prosecuted for the same, either in the County where

where the Fact is committed, or in any County next adjoining; in which adjoining County any Indictment may be laid by any other Prosecutor; and if the Fact be committed in *Wales*, then the Prosecution shall be carried on in the next adjoining *English* County; and the Charges of such Prosecutions by the Clerk of the Peace shall be paid by the Treasurer of the County or Division where the Fact is committed, to such Amount, as the Justices of the Peace in their Sessions order; and if such Clerk of the Peace neglect to carry on such Prosecution, he shall forfeit 100 *l.* for every such Offence, to any Person who shall sue for the same by Action of Debt, &c. in any Court of Record at *Westminster*; in which no *Essoin*, &c. shall be allowed.

and the Charges to be paid by the Treasurer of the County.

Clerk of the Peace neglecting to prosecute, forfeits 100 *l.*

By *Seet. 9.* The Commissioners of the Land Tax, the Deputy Sheriff, the Coroner, and the Officers of Excise in each County, Riding, and Division, shall be the proper Officers for putting in Execution this Act, and 12 *Ann. St. 2. cap. 18.* with those therein named for that Purpose.

Officers for putting this and 12 *Ann. St. 2. c. 18.* in Execution.

By *Seet. 10.* The Lord Warden of the Cinque Ports, and the Lieutenant of *Dover Castle*, and the Deputy Warden of the Cinque Ports, and the Judge official, and Commissary of the Court of Admiralty of the Cinque Ports, two ancient Towns, and the Members thereof, and every of them, and every other Person appointed by the Lord Warden of the Cinque Ports, pursuant to 3 *Geo. cap. 13.* shall be the Persons to put in Execution, within the Jurisdiction of the Cinque Ports, two ancient Towns and their Members, all the Powers given by this Act, and the 12 *Ann. St. 2. cap. 18.* and the 4 *Geo. cap. 12.*

Officers for putting this and 12 *Ann. St. 2. c. 18.* in Execution within the Liberty of the Cinque Ports, &c.

Persons convicted of assaulting any Magistrate, or Officer, &c. in the Salvage of any Vessel or Goods, to be transported for seven Years.

By *Señ. 11.* If any Sheriff, or his Deputy, Justice of Peace, Mayor, or other Magistrate, Lord of a Manor, Commissioner of the Land-Tax, Chief Constable, or Petty Constable, or other Peace Officer, or any Custom-house or Excise Officer, or other Person lawfully authorized, be assaulted, beaten, and wounded, for the Exercise of his Duty, in the Salvage of any Ship in Distress, or of any Ship or Goods stranded, wrecked, or cast on Shore, or lying under Water, in any of his Majesty's Dominions, any Person so assaulting, beating, and wounding, shall upon Conviction, by Indictment at the Assizes, or General Goal Delivery, or at the General or Quarter Sessions for the County or Division where such Offence is committed, be transported for seven Years to some of his Majesty's Colonies in *America*, and be subject to such Punishment, in case of Return before that Time, as other Persons under Sentence of Transportation.

Justices in the Absence of the Sheriff may take a sufficient Force to repress Violence, &c. Persons empowered to give Orders, where any shall be assembled in case of a Shipwreck, &c.

By *Señ. 12.* It shall be lawful for any Justice of Peace, in case of Need, and in the Absence of the High Sheriff, to take sufficient Power of the County, to repress all unjust Violence, and to enforce the Execution of this Act.

By *Señ. 13.* All Persons so assembled to save any Ship or Goods shall conform in the first Place to the Orders of the Master or other Officers or Owners, or other Persons employed by them; and for want of their Presence or Directions, to the Orders of the Persons authorized by this Act, or 12 *Ann. St. 2. cap. 18.* in the following Subordination, as any of them happen to be present, *viz.* in the first Place, to the Orders of any Officer of

of the Customs, then of any Officer of the Excise, then of the Sheriff or his Deputy, then of any Justice of Peace, then of the Mayor or Chief Magistrate of any Corporation, then of the Coroner, then of any Commissioners of the Land-Tax, then of any Chief Constable, then of any Petty Constable, or other Peace Officer: And any Person acting wilfully contrary to such Orders, shall forfeit any Sum not exceeding 5 *l.* to be levied by Warrant of one Justice of Peace; and in case of Non-payment, the Offender shall be committed to the House of Correction, for any Time not exceeding three Months.

Persons acting contrary to Orders, forfeit 5 *l.*

By *Sett.* 14. This Act shall not prejudice his Majesty, or any Grantee of the Crown, or any Lord of Manor, or other Person in any Right to any Wreck, or Goods which are *Floisam, Jetsam, or Lagan.*

Rights of the Crown, &c. reserved.

By *Sett.* 15. The Officer of the Customs, who acts in the preserving of any Ship in Distress, or the Cargo, shall, as soon as may be, cause all Persons belonging to the said Ship, and others who can give any Account thereof, or of the Cargo, to be examined upon Oath before some Justice of the Peace, as to the Name or Description of the Ship, and the Names of the Master or Chief Officer and Owners thereof, and of the Cargo, and of the Ports from or to which the said Ship was bound, and the Occasion of the said Ship's Distress; which Examination the said Justices are to take in Writing; and they shall deliver a Copy thereof, together with a Copy of the Account of the Goods, to the said Officer of the Customs; who shall forthwith transmit the same to the Secretary of

Examination on Oath to be taken of the Ship's Name, Cargo and Owners, &c.

And Copy to be transmitted to the Secretary of the Admiralty and published in the Gazette.

the

the Admiralty: who shall publish in the next *London Gazette*, so much thereof as is necessary for the Information of Persons interested.

By *Seet. 16.* The 12 *Ann. St. 2. cap. 18.* and the 4 *Geo. cap. 12.* shall remain in Force, have only so far as the same are altered by this Act.

The Acts 12 Ann. St. 2. c. 18. and 4 Geo. c. 12. to be in Force where not altered by this Act.

Not to extend to Scotland. By *Seet. 18.* Nothing in this Act shall extend to Scotland.

END OF THE FIRST VOLUME.

Ex. W. E. F.
92/2/04